Parts Depot, Inc. *and* Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE.) Cases 12–CA–16449, 12–CA–16741, and 12–RC–7736

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On June 30, 1997, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions. The General Counsel filed cross-exceptions and a supporting brief, the Charging Party also filed a brief in support of the General Counsel's cross-exceptions, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order.[2]

1. The Respondent excepts to the judge's finding that, beginning on June 1 until October 27, 1994, the Respondent embarked on a campaign of fabricated discipline, fraudulent performance evaluation, and unlawful layoff of employee Vivian Fortin in retaliation for her support of, and to discourage others from supporting, the Union. The Respondent contends that it was justified in issuing disciplinary warnings to Fortin, that her performance evaluation was based on her low productivity, and that her selection for layoff was based on the evaluation and with no consideration, or indeed knowledge, of her union activity. We find no merit to the Respondent's exceptions.

The Respondent is in the business of selling automotive replacement parts at wholesale from 11 warehouses and distribution centers in the eastern United States. Fortin began work at the Respondent's Miami warehouse in 1986 and, from that time until her layoff in October 1994, she held a number of customer service positions. Because of her reputation for providing excellent service to customers,[3] in early 1994 the Respondent's then-vice president for southern operations, Peter Bassett,[4] assigned Fortin to staff the Metro-Dade account, a separate account established by Bassett to provide exclusive service to approximately two dozen governmental customers in the metropolitan Dade County area.[5] As of June 1994 Fortin had been commended for increasing sales in the Metro-Dade account.

All that changed on June 1, 1994, however, when the Respondent learned of Fortin's prominent support for the Union. On that day, Fortin appeared under subpoena to testify on the Union's behalf at a representation hearing and was quoted in the *Miami Herald* as saying the workers "want to better ourselves."[6] When she returned to work later that day, Fortin received her first disciplinary warning since she began working for the Respondent. In total, the Respondent would issue four disciplinary warnings to Fortin during June, three within 2 days of the hearing, warnings that the judge found were based on fabricated allegations against Fortin.[7] Also during that time, in what was described as a cost-cutting move, the

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951.) We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding that the Respondent's vice president for southern operations, Peter Bassett, did not threaten plant closure, as alleged in complaint par. 5(b), in a conversation with Jose Castro on May 9, 1994, when Bassett said, "Remember what happened to Eastern Airlines. Because they let the union in they went bankrupt." At most, Bassett's isolated statement is a misrepresentation as to what caused Eastern to go bankrupt, not an implicit statement that Parts Depot would take action on its own to declare bankruptcy if the Union won the election. In reaching this conclusion, we also rely on the judge's crediting of testimony that the speeches made by Bassett to employees did not include any unlawful veiled references to plant closure.

[2] The judge's recommended Order and notice, as written, encompass the additional violations found below, and thus no modifications to the Order are necessary.

[3] Bassett described Fortin as cheerful and willing to do whatever assisting work needed to be done. He also noted her skill at performing lookups, a process, which involves identifying a part by its appearance and looking up its part number. Indeed, the Respondent acknowledged that customers would ask for Fortin by name to perform this service.

[4] Bassett's office was located at the Miami facility at issue here.

[5] There is no dispute that, in order to remain competitive, the Metro-Dade account required an added level of customer service from that provided in the Respondent's telephone order room. To that end, Fortin was seated in an office separate from the "phone room" in which all other telephone orders were taken. In addition, Bassett installed a separate telephone line with voice mail capabilities for Metro-Dade customers only and established a delivery van specifically for those customers.

[6] Fortin was the only employee quoted in the article.

[7] The Respondent issued Fortin a warning on June 1, 1994, for failing to promptly return to work from the representation hearing; she punched out at noon and returned at 3:40 p.m. The next day, the Respondent issued a written warning for an incident at the loading dock when Fortin told a group of employees, in Spanish, to return to work. That same day she was disciplined for taking a coffeebreak with another employee. The other employee did not receive any discipline. Then, on June 23, Fortin was disciplined for talking to another employee before work.

Respondent removed the recently implemented services for the Metro-Dade account, i.e., the exclusive telephone number with its voice mail capabilities used to reach Fortin directly, and ceased the special van deliveries to those customers. The Respondent thereafter groundlessly held Fortin accountable for the ensuing decreased sales in the Metro-Dade account, which the judge found was more likely attributable to the elimination of these support services.

Notwithstanding this discipline, Fortin remained one of the Union's most prominent vocal supporters, appearing in a group photo on a union flyer distributed during the campaign, passing out leaflets and petitions, and serving as one of the Union's two observers at the election held July 7 and 8, 1994.[8]

The Respondent contends that each of the disciplinary actions it took against Fortin was unrelated to her union activity. The Respondent contends that in each case Fortin was disciplined for being away from her workstation and in an area of the warehouse where she did not belong. The evidence does not support the Respondent's contentions.

Contrary to the Respondent, the credited testimony reveals that Fortin did have business reasons to visit the warehouse, had done so routinely in the past, and that the Respondent began to restrict her movements only after it learned of her support for the Union. Moreover, the credited testimony also shows that other employees were not similarly disciplined, even those employees who were talking to Fortin on the very occasion for which she was disciplined. Given this disparity of treatment and the fact that Fortin's movements were not restricted before the Respondent learned of her union activity, the reasonable inference, which we draw, is that Fortin's union activity was a motivating factor in the Respondent's discipline of her.

The Respondent also excepts to the judge's finding that it was motivated by union animus in giving Fortin a low performance evaluation in August 1994. The Respondent contends that Fortin's evaluation was based on her low call productivity (an average of 100 calls per day as compared with the 200–300 calls taken by the customer service representatives in the phone room) and declining sales in the Metro-Dade account. According to the Respondent, the judge ignored the uncontroverted evidence that the Respondent's outside salesman, Robert Ortega, told Bassett that customers were complaining of poor service. Moreover, the Respondent contends that at the time of the evaluation Metro-Dade sales had declined and it blamed the decline on Fortin's being away from her desk and unable to receive the calls. Finally, the Respondent contends that the judge engaged in "rank speculation" when he determined what Fortin should have received on her evaluation based on past evaluations in 1987 and 1989.

There is no dispute that, in early August 1994, the Respondent issued Fortin a performance evaluation in which she received an overall rating of "2," indicating "improvement needed." The judge found the Respondent's reasons for its low evaluation of Fortin to be fraudulent, pretextual, and motivated by union animus. In finding the unfavorable evaluation to have been unlawfully motivated, the judge engaged in an extensive analysis of Fortin's prior evaluations, in 1987 and 1989, and compared the different categories on the respective evaluations.[9] Based on that analysis, the judge determined that, had the Respondent not been unlawfully motivated, Fortin would have received an overall rating equivalent to a 4, indicating "above standard."

We agree with the judge that the Respondent's reasons for giving Fortin an unfavorable performance evaluation ring hollow. By the account of its own witnesses, the evaluation covered a 1-year period from August 1993 to August 1994, during which Fortin was selected for the Metro-Dade account based on her good reputation for customer service and commended for increasing the Metro-Dade sales during the months prior to June. The Respondent presented no data or analyses in connection with its assertion that Metro-Dade sales declined in July. More importantly, the Respondent failed to show that any decline in July was the result of Fortin's actions. As noted above, during June, the Respondent removed the special phone line, voice mail service, and special delivery van dedicated to Metro-Dade customers, and, like the judge, we infer that any decline is more reasonably attributable to the elimination of these support services.

The Respondent's reliance on Fortin's purported low call productivity is also unpersuasive. First, there is no evidence, beyond Pacheco's discredited testimony, that Fortin was ever warned about low call productivity. Moreover, by all accounts, Fortin's position servicing the Metro-Dade account required a higher level of customer service and a different form of service from those in the phone room to whom she was being compared.[10] In

[8] The tally of ballots showed 40 votes for the Union and 46 against, with 13 determinative challenged ballots. The challenges were resolved at the hearing with the parties agreeing to sustain the challenges to seven employees and to find eligible the remaining six, which the judge found were no longer determinative.

[9] The Respondent used a different evaluation form in 1994 than it had in years past.

[10] For example, Fortin's task was to call the customers for their orders, as contrasted with the customer service representatives in the phone room who received calls from customers placing orders.

short, we agree with the judge that the Respondent's purported reasons for issuing disciplinary warnings and an unfavorable performance evaluation to Fortin were pretextual, designed to cover up the Respondent's unlawful discriminatory motive.

Having so found, we find it unnecessary to rely on the judge's analysis of what Fortin *would have been rated* in the absence of the Respondent's unlawful retaliation for her union support. The General Counsel has demonstrated that animus against Fortin for her union activity was a motivating factor in the Respondent's issuance of an unfavorable performance evaluation. The burden therefore shifts to the Respondent to show that Fortin would have received the unfavorable evaluation even absent her union activity.[11] Because we find that the Respondent's proffered reasons for Fortin's unfavorable evaluation were pretextual, we find that the Respondent has not carried that burden.[12]

The Respondent also excepts to the judge's finding that the Respondent was motivated by union animus in selecting Fortin for layoff on October 27.[13] In support of its argument, the Respondent argues that Mark Noble, vice president for warehouse operations and Bassett's successor at the Miami facility,[14] made the layoff decision and points to the lack of evidence of union animus or knowledge of Fortin's union activity on his part. In this regard, the Respondent notes the undisputed evidence that Noble was not present at the facility either during or immediately after the union campaign and election. In addition, the Respondent points to Noble's testimony that he made the decision about whom to lay off without input from management at the facility and strictly on the basis of the performance evaluations.

Initially, we note that the judge discredited Noble's testimony that he was uninfluenced by anyone at the facility or by any union animus of his own. Rather, the judge found that Noble was aware of Fortin's union activity and was directed by the Respondent's chairman, Olson, or president, Al Wood, to retaliate against Fortin for her union activity.[15] In any event, even if Noble's motives in selecting Fortin for layoff were not themselves unlawful, his selection of Fortin for layoff admittedly was based primarily on an evaluation of Fortin that we have found to be tainted by the Respondent's union animus. Noble's reliance on that tainted evaluation provides the nexus for showing that the decision to lay off Fortin was the result of unlawful discrimination. Thus we find that the Respondent's decision to lay off Fortin on October 27, 1994, violated Section 8(a)(3.) See *C&L Systems Corp.*, 299 NLRB 366, 379 (1990), enfd. 935 F.2d 270 (6th Cir. 1991), quoting *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (antiunion motivation of supervisor imputed to decisionmaker in order to prevent "company [from] launder[ing] the 'bad' motives of certain of its supervisors by forwarding a dispassionate report to a neutral superior".)

2. The judge found, and we agree, that the Respondent, through Bassett, violated Section 8(a)(1) by promising to terminate Warehouse Manager Bill Beaman if that would stop the union effort. The General Counsel contends the judge also should have found that Bassett interrogated employee Vivian Fortin during that same conversation. We agree.

Early on the morning of May 12, 1994, Bassett summoned Fortin to his office and asked whether she had heard rumors about the Union. When she replied that she had Bassett asked what he could do to stop the Union and if getting rid of Beaman would help. Fortin said she did not know, and the conversation ended.

The judge found, and we agree, that Bassett's asking Fortin whether the Union could be stopped if he terminated Beaman constituted an unlawful offer to improve working conditions in violation of Section 8(a)(1.) However, the judge dismissed the related complaint allegation that the conversation was an unlawful interrogation. In that regard, the judge found that there was no coercion during this conversation inasmuch as Bassett was unaware that Fortin had signed a union card, he had spoken with her a number of times over the years, and he "trusted" her. We disagree.

An employer violates Section 8(a)(1) when it interrogates an employee about the union where the questioning reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB

[11] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982.)

[12] See *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982.)

[13] Fortin was the only phone room employee laid off in October. Another phone room employee, Michelle Sanchez, quit before the layoff. In an earlier layoff in August, the Respondent laid off 25 warehouse employees.

[14] The Respondent underwent a corporate reorganization in September 1994, which removed Bassett as the vice president for southern operations and replaced him with Mark Noble, who had been Bassett's counterpart for northern operations stationed at the Respondent's headquarters in Roanoke, Virginia. From 1994 until some time during the hearing on this case in 1996, when Bassett left the Respondent's employ, Bassett served as a vice president in Roanoke.

[15] Olson had been the Respondent's president as well as chairman until June 1, 1994, when Al Woods was hired as president. Olson kept his office at the Miami facility.

1217 (1985.) To determine whether the inquiry is coercive, the Board considers the following factors: the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation.

Applying these factors to Bassett's interrogation of Fortin, we find that coercion prohibited by Section 8(a)(1) is amply demonstrated. As of May 12, 1994, Fortin was not an open and active union supporter.[16] On that date Bassett, the highest management official at the facility, summoned her to his office for no purpose other than to ask her about the Union and, during the course of the brief conversation, unlawfully promised to improve working conditions in order to stop the union effort.[17] Where the interrogation is accompanied by threats or other violations of Section 8(a)(1), as this one was, there can be no question as to the coercive effect of the inquiry.[18] We find, therefore, that Bassett interrogated Fortin in violation of Section 8(a)(1.)

3. The General Counsel and the Charging Party also except to the judge's dismissal of complaint paragraph 5(e) which alleges that Bassett "offered employees an open-door policy and offered to negotiate directly with employees to resolve their grievances in order to discourage employees from joining the Union." Crediting Bassett, the judge found that, during a meeting on May 17, he read from page 9 of the employee handbook and reminded employees of the Respondent's open-door policy that the employees could use to address such personal matters as sick days not properly being recorded in the employees' personnel files. That passage, entitled "Employee Relations," states:

> The Company believes that the work [sic] conditions, wages, and benefits it offers to its employees are competitive with those offered by other employers in this area and in this industry. If employees have concerns about work [sic] conditions or compensation, they are strongly encouraged to voice these concerns openly and directly to their supervisors.
>
> Our experience has shown that when employees deal openly and directly with supervisors, the work environment can be excellent, communications can be clear, and attitudes can be positive. We believe that the Company amply demonstrates its commitment to employees by responding effectively to employee concerns.

The judge found that Bassett told the employees that, under the open-door policy as provided in the handbook, employees with problems could come see either himself or Operations Manager Jenkins. The judge found that Bassett's statement was not inconsistent with the handbook's policy and dismissed the allegation.

The General Counsel and the Charging Party argue, however, that, even assuming that the ambiguous language of the handbook is consistent with an open-door policy, that policy was not the policy in effect at the facility. Rather, they point to undisputed testimony that the warehouse manager, Bill Beaman, who was fired by Bassett on May 13, 1994, had prevented employees from taking their concerns directly to Bassett.

Several employees testified without contradiction that Beaman forbade them from bringing their problems and concerns to anyone but him. Thus, at least during Beaman's tenure, the Respondent's "policy" was not the ambiguous "open-door policy" contained in the handbook, but that the warehouse employees were to bring their concerns to their warehouse manager, not to Bassett. Bassett's articulation of a policy that effectively for the first time opened his door to the employees thus represents an improvement in working conditions for those employees and a violation of Section 8(a)(1.)[19]

4. The General Counsel and Charging Party also except to the judge's dismissal of complaint paragraph 6(b), which alleges that the Respondent's fleet supervisor, Robert Williamson, interrogated employee Osberto Jerez about his union activity during a conversation on June 9, 1994. Crediting Jerez over Williamson's denial, the judge found that, on that date, Williamson called to Jerez as he was about to leave on his route and asked, in an angry and elevated tone, what Jerez' picture was doing on a prounion flyer that had been distributed to employees at the Respondent's Fort Lauderdale facility. Williamson also told Jerez that management already knew who the union leaders were and proceeded to name

[16] There is no evidence that the Respondent was aware that Fortin signed a union card 2 days earlier.

[17] This is not, as the judge suggests, a case where Bassett was privileged to talk to Fortin about the Union on the basis of friendship. Cf. *Churchill's Supermarkets*, 285 NLRB 138 (1987), enfd. 857 F.2d 1474 (6th Cir. 1981), cert. denied 490 U.S. 1046 (1989.) There is no indication on this lengthy record that Fortin's relationship with Bassett was anything but that of employee and employer. See *Acme Bus Corp.*, 320 NLRB 458, 458 (1995), enfd. 198 F.3d 233 (2d Cir. 1999) (friendly relationship between supervisor and employee does not diminish coerciveness of interrogation.)

[18] *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985.) Indeed, the message Bassett delivered to Fortin during their brief conversation was that the Respondent would go to great lengths, even fire the warehouse manager, in order to stop the union effort.

[19] See *NLRB v. S.E. Nichols,* 262 F.2d 952, 958 (2d Cir. 1988), cert. denied 490 U.S. 1008 (1989) (upholding Board finding that open-door policy, if it existed, had been inconsistently applied and that change in policy during campaign violated Sec. 8(a)(1.))

several employees who were involved with the organizing campaign.[20] Despite these factual findings, the judge dismissed the interrogation under *Rossmore House* on the ground that Jerez was an open union supporter. We disagree.

As noted above, in *Rossmore House* the Board held that the questioning of open and active union supporters about their union sentiments, unaccompanied by threats or promises, was not coercive and, therefore, not a violation of Section 8(a)(1.)[21] In this case, however, as the judge noted, Williamson's remarks, delivered in an elevated and angry tone, contained an implied threat of unspecified reprisals. An interrogation of an open and active union supporter, coupled with such a threat, is coercive and a violation of Section 8(a)(1), and we so find.[22] *Rossmore House*, supra.

5. Finally, the Respondent excepts to the judge's finding that a *Gissel*[23] bargaining order is warranted in this case. First, the Respondent takes issue with the judge's finding that the Union enjoyed majority support, contending that the judge erroneously admitted unauthenticated cards. The Respondent next argues that the passage of time and the turnover of management and employees render a free and fair election possible. Finally, the Respondent argues that the violations found are neither pervasive nor serious enough to warrant a bargaining order.

The judge found that the Union had established that it had authorization cards signed by 66 of the 102 unit employees, thus demonstrating its majority status. We find no merit in the Respondent's contention that several of the union authorization cards were not reliably authenticated at trial because the signatures were identified by the judge or a handwriting expert rather that the actual signer. As the judge found, the Board has long held, consistent with Section 901(b)(3) of the Federal Rules of Evidence, that a judge or a handwriting expert may determine the genuineness of signatures on authorization cards by comparing them to W-4 forms in the employer's records. See *Traction Wholesale Center Co.,* 328 NLRB 1058, 1059 (1999), enfd. 216 F.3d 92 (D.C. Cir. 2000); *Justak Bros.*, 253 NLRB 1054, 1079 (1981), enfd. 664 F.2d 1074 (7th Cir. 1981) (judge compared signatures on the cards to employment documents to determine authenticity); *Naum Bros., Inc.*, 240 NLRB 311, 320 (1979) (authentication by handwriting expert.) We find, therefore, in agreement with the judge, that the Union had obtained signed authorization cards from a majority of the employees as of May 13, 1995, when the Union filed its petition.[24] We also agree that the Respondent's obligation to bargain attached on May 20, 1994, the date the Respondent embarked on a campaign of unfair labor practices,[25] and that subsequent unilateral actions taken by the Respondent—e.g., general wage increases and layoffs in August and October 1994—therefore violated Section 8(a)(5.)

We further agree with the judge that a *Gissel* order is necessary to remedy the effects of the Respondent's unlawful actions. In category II cases[26] such as this, the Supreme Court has stated that the Board "can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue."[27]

Taking such factors into consideration, we find, in agreement with the judge, that the Respondent's unlawful conduct, both before and after the election,[28] clearly demonstrates that the holding of a fair election in the future would be unlikely and that the "employees' wishes

[20] Specifically, Williamson named as "union leaders" employees Vivian Fortin, Ronald Casco, Jose Castro, David Rondon, and Albert Rosado.

[21] Supra at 1176, enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006.

[22] We also disagree with the judge's determination that the threat is at such substantial variance from the pleadings as to warrant dismissal. The exchange between Williamson and Jerez was fully litigated—Jerez recounted the conversation and Williamson denied that there was any such conversation—and the allegation pled and the violation found are closely linked. See *Baytown Sun*, 255 NLRB 154 (1981.)

[23] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969.)

[24] The judge found, and we agree, that the General Counsel established that the Union held valid cards from 66 employees of the 102 employee bargaining unit, at least 54 of which were executed on or before May 13, 1994, the date the Union filed its petition.

[25] See *Joy Recovery Technology Corp.*, 320 NLRB 356 fn. 4 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998.)

[26] The Supreme Court in *Gissel* described a category II case as one "marked by less pervasive [unfair labor] practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." *Gissel,* 395 U.S. 613–614.

[27] 395 U.S. 614–615.

[28] In addition to the unfair labor practices found in this case, we find the bargaining order is further supported by the Respondent's unlawful conduct committed proximate to the hearing in this proceeding against employees who were to provide, or did provide, testimony relevant to the Respondent's earlier misconduct. See *Parts Depot, Inc.*, 332 NLRB No. 65 (2000) (*Parts Depot II*.) The Respondent's actions in *Parts Depot II* provide additional evidence of its proclivity to violate the Act and that the chances of holding a fair election are slight.

are better gauged by an old card majority than by a new election."[29]

As mandated by the Supreme Court in *Gissel,* we have examined the extensiveness of the Respondent's unfair labor practices and the likelihood of their recurrence in the future. In this regard, we note that the unfair labor practices committed by the Respondent in this case include "hallmark" violations, such as the retaliatory discipline, unlawfully motivated evaluation, and layoff of the most prominent union supporter, the postelection across-the-board wage increases, and additional wage increases based on merit reviews. The Respondent also committed other serious and pervasive unfair labor practices in its attempt to discourage support for the Union. These violations include coercively interrogating and offering to improve working conditions by discharging the warehouse manager;[30] granting new benefits by posting the opportunity for unit employees to apply for the position of warehouse manager and promoting a unit employee to that position; soliciting grievances by promulgating an open-door policy; coercively instructing employees to refrain from supporting the union; unlawfully promulgating a no-access rule; and threatening employees with unspecified reprisals.[31]

The coercive effect of the Respondent's unlawful actions is self-evident. These serious violations began the very day the Respondent learned of union activity at the facility and continued even after the election, when the Respondent granted an unprecedented across-the-board wage increase, reinstituted an effectively dormant evaluation system for additional merit wage increases, prepared and issued a fraudulent performance evaluation and used that evaluation to lay off the most prominent union supporter.[32] These actions sent the clear and unmistakable message to employees that if they reject the Union they will be rewarded but if they support the Union they will be disciplined and laid off on pretextual grounds.

The severity of the Respondent's unlawful conduct is exacerbated by the involvement of high ranking officials. See *M. J. Metal Products*, 328 NLRB 1184, 1185 (1999.) As found by the judge, the Respondent's unfair labor practices emanated from the Company's chairman and owner, Rollie Olson, from Bassett, the highest management official at the facility, and from his successor, Mark Noble.[33] As the Board has observed in *Consec Security*, 325 NLRB 453, 455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999) "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten." As noted in *Parts Depot II*, Bassett's unlawful conduct persisted into 1996, after he left the Respondent's direct employ and began consulting for the Respondent.

The fact, as discussed above, that some of the most serious violations were committed after the election is also significant. As the Board observed in *M. J. Metal Products,* supra, "[a]n employer's continuing hostility toward employee rights in its postelection conduct 'evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort.' Id., at 1185, quoting *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d. Cir. 1995.)"

As the Board has also noted, the effects of an unlawfully granted wage increase are particularly difficult to remedy by traditional means.

> Unlawfully granted benefits have a particularly long-glasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees. *Color Tech Corp*., 286 NLRB 476, 477 (1987.) Further, the benefits unlawfully granted will serve as a reminder to the employees that the Respondent, not the Union, is the source of such benefits and that they may continue as long as the employees do not support the Union.[34]

The Respondent claims that a bargaining order would be inappropriate due to turnover in the bargaining unit since the election. The Respondent presented an offer of proof at the hearing that, of the 101 employees in the unit at the time of the election, less than 50 were employed at the time of the hearing, and points out that Bassett and Jenkins, who committed many of the 8(a)(1) violations,

[29] *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996.)

[30] The Respondent did in fact discharge its unpopular warehouse manager, Bill Beaman, within days of learning of the union campaign in order to discourage support for the Union. See, e.g., *Burlington Times, Inc.*, 328 NLRB 750, 751 (1999.)

[31] These repeated unfair labor practices occurred in the context of the Respondent's intensive campaign to deter unionization, which included 30 meetings conducted by Vice President Bassett among groups of employees during the 50-day period before the election.

[32] Twenty-five warehouse employees were laid off or left for other reasons in August 1994, among them, Ronald Casco, who, like Fortin, served as the Union's observer during the election.

[33] The judge found that Olson ordered Jenkins to issue disciplinary warnings to Fortin and ordered Noble to select her for layoff. Bassett personally committed many of the unfair labor practices before the election and directed the fraudulent performance evaluation of Fortin, which led to her layoff.

[34] *Gerig's Dump Trucking*, 320 NLRB 1017, 1017–1018 (1996), enfd. 137 F.3d 936 (7th Cir. 1998.)

have left the Respondent's employ. We find no merit in these contentions.

As the Board noted recently in *Garvey Marine*, *Inc*., 328 NLRB 991, 995 (1999):

> The Board traditionally does not consider turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy based on the situation at the time the unfair labor practices were committed. *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990.) Otherwise, the employer that has committed unfair labor practices of sufficient gravity to warrant the issuance of a bargaining order would be allowed to benefit from the effects of its wrongdoing. These effects include the delays inherent in the litigation process as well as employee turnover, some of which may occur as a direct result of the unlawful conduct. Thus, the employer would be rewarded for, or at a minimum, relieved of the remedial consequences of, its statutory violations. See *Intersweet*, *Inc*. 321 NLRB 1 (1966), enfd. 125 F.3d 1064 (7th Cir. 1997.) Such a result would permit employers, particularly in businesses . . . that experience significant turnover in normal circumstances, to disregard the requirements of the Act with impunity, with little expectation of incurring the legal consequences of their violations. In addition, the Board has noted that a bargaining order's impact on employee free choice is limited, because employees remain free to reject their bargaining representative after a reasonable period of time. *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), enfd. 192 F.2d 740, 742 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952.)

Nevertheless, even accepting, arguendo, the facts asserted by the Respondent concerning employee turnover, we find that the effects of the unlawful conduct are unlikely to be sufficiently dissipated by turnover to ensure a free second election. Although a significant number of the employees who were employed at the time of the unlawful conduct surrounding the election may have left the facility for reasons related or unrelated to the Respondent's unfair labor practices, others who remain would recall these events. Moreover, as noted above, the lingering effects of an across-the-board wage increase and the merit increases are particularly difficult to dispel.[35]

We conclude that the effects of the serious unfair labor practices here, which the Respondent commenced immediately upon learning of the union campaign and continued until it had rid itself of the most prominent union supporter, cannot adequately be remedied by the Board's traditional remedies. Rather we find the circumstances of this case fully warrant the imposition of a bargaining order as a necessary and appropriate means of effectuating the policies of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Parts Depot, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

George Aude, Esq., for the General Counsel.

Charles S. Caulkins, Esq. and *Kenneth A. Knox, Esq. (Fisher & Phillips)*, of Ft. Lauderdale, Florida, for the Respondent.

Brent Garren, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a *Gissel*[1] case (Government seeks an order requiring the employer, PDI, to recognize and bargain with the Union based on a majority card-showing plus severe unfair labor practices.) On most major allegations, I find for the Government. A principal unfair labor practice by Parts Dept, Inc. (PDI) was its discrimination against Vivian Fortin, the worker who became the symbol of the Union's organizing campaign. In October, after the Union lost the July 1994 election, PDI laid off Fortin based primarily on a fraudulent, as I find, performance evaluation. Fortin's industrial execution evokes the memory of verse four from the 1925 poem by Alfred Hayes, *I Dreamed I Saw Joe Hill Last Night*. Gibbs M. Smith, Joe Hill 194 (1969, 1984, Peregrine Smith Books): [2]

> And standing there as big as life
> And smiling with his eyes,
> Joe says, "What they forgot to kill
> Went on to organize,
> Went on to organize."

[35] As in *Garvey Marine*, above, we find distinguishable those recent cases where the Board has concluded that a bargaining order would likely be unenforceable given the passage of time since the Respondent's violations. The delay here—the Respondent's violations occurred in 1994 and the judge's decision issued in 1997—although regrettable, was due in part to the number of alleged violations and the size of the record (over 4200 pages of transcript.) Further, such delay has not been found excessive in prior cases. See *Garvey Marine*, 328 NLRB 991, 997 (discussing court decisions.) Additionally, as noted above, fn. 28, we have also taken into account here the Respondent's unlawful conduct that occurred proximate to the 1996 hearing in this case, which is addressed in our decision on exceptions to the judge's decision in *Parts Depot II*.

[1] *NLRB v. Gissel Packing Co.,* 395 U.S. 575, (1969.)

[2] Put to music by Earl Robinson in the 1930s, the poem became the song, *Joe Hill.* Edith Fowke, and Joe Glazer, Songs of Work and Protest, 20–21 (1973, Dover Publications.)

Along with the requested bargaining order, and other remedial provisions, I order PDI to offer full and immediate reinstatement to Vivian Fortin, and to make her whole, with interest.

I presided at this 24-day trial in Miami, Florida, beginning April 22, 1996 and closing May 7, 1996. Trial was pursuant to the September 29, 1995 consolidated Complaint and Notice of Hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 12 of the Board. By her order of October 11, 1995, the Regional Director consolidated Case 12–RC–7736 (objections and challenged ballots) for trial with the complaint case. The complaint is based on charges filed August 8, 1994 (and later amended) in Case 12–CA–16449, and on November 10, 1994 in Case 12–CA–16741. The charges were filed by the Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC (Amalgamated) against Parts Depot, Inc. (PDI, Company, or Respondent.)

On the first day of the trial, the Government (General Counsel) moved (1:6) to amend the complaint to show the Union's name as Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE.)[3] The Union's counsel represented that UNITE was created from the July 1995 merger of Amalgamated and the International Ladies Garment Workers Union (ILG.) (1:7.) PDI objected on the basis that the authorization cards involved were those of the Amalgamated, not those of UNITE, and that any bargaining order, even if otherwise appropriate, could not issue respecting UNITE. (1:6–7; 6:902–904.) Granting the Government's motion to amend, I cautioned that I would reevaluate the matter after reviewing the posthearing briefs. (6:909.) As noted in a moment, PDI does not dispute UNITE's status as a labor organization. In this decision, I refer to UNITE as the Charging Party or Union. Later in this decision I find that UNITE is a proper successor to the Amalgamated. Hence, PDI's objections are without merit.

In the Government's complaint, the General Counsel alleges that PDI (1) violated Section 8(a)(1) of the Act by interrogations, threats, promises of benefits, and other conduct between about mid-May 1994 and July 1994 (complaint paras. 5 through 10);[4] (2) violated Section 8(a)(3) of the Act between about May 16 and October 27 by various acts, including a July 1994 grant of wage increases, an August 10 layoff of 13 employees, and the October 27 layoff of Vivian Fortin, (paras. 11 through 16); and (3) violated Section 8(a)(5) by the July wage increases and the layoffs (complaint paras. 14–17, 22.) Because of PDI's conduct described in complaint paragraphs 5-16, which allegedly would render it unlikely that a fair rerun election could be conducted (the Union was on the short end of a vote count in an election conducted July 7 and 8, with challenged ballots determinative), the General Counsel alleges (para. 21) that, based on a majority showing by authorization cards, a bargaining order should issue.

PDI denies all allegations of wrongdoing, and denies that, in any event, a bargaining order would be appropriate.

The pleadings establish that the Board has both statutory and discretionary jurisdiction over PDI, and that Parts Depot, Inc., at all relevant times, has been an employer engaged in commerce within the meaning of the statute. The parties stipulated that UNITE is a statutory labor organization. (6:902–903.)

My decision is based on the entire record, including my observation of the demeanor of the witnesses. The transcript contains a number of errors. In nearly all instances, a correct reading is made possible by the context or even by later references. PDI filed a motion, dated January 3, 1997, to correct one such error. As the motion is unopposed and is consistent both with the context and my own trial notes, I grant the motion to correct 17:2788:3 to substitute "was not laid off" for "was laid off." At another point (2:183-184), a statement of mine possibly can be read as my speaking to the witness, when I actually was addressing the General Counsel.

The General Counsel filed a motion, dated May 16, 1997, to reopen the record in order to consolidate, with this case, the April 28, 1997 complaint in Case 12–CA–18478. The principal allegation of the new complaint is that PDI discharged Jose Castro on November 6, 1996 in violation of Section 8(a)(3) and (4) of the Act. Castro was one of the General Counsel's witnesses in the instant case. By memo I faxed to counsel on May 22, 1997, I requested all counsel to address certain questions. Having received no response as of this writing, I assume that the General Counsel has abandoned the Government's motion, and I address it no further.

After consideration of the briefs filed by the General Counsel, the Union (whose brief is limited to certain major issues), and Respondent PDI, I make these:

FINDINGS OF FACT

A. Procedural Matters

1. Attorney-client privilege

An issue arose at trial concerning whether the Union's attorney could object on the basis of attorney-client privilege respecting questions delving into conversations between counsel and alleged discriminatees named in the complaint. (3:482.) Eventually I ruled that the Union's attorney could so object. (5:795.) A related question was whether the presence of the General Counsel at any such conference waived the attorney-client privilege. Initially I ruled that it did. (3:495–496.) The Union thereafter argued (4:527, 624) no waiver on the basis of a common interest [similar to criminal law cases of joint prosecution and joint defense, as in *In Re Grand Jury Subpoenas,* 902 F.2d 244, 248–249 (4th Cir. 1990)]. See, for example, *Sedelacek v. Morgan Stanley Trading Group,* 795 F. Supp. 329, 331 (C.D. Cal. 1992); *Wilson P. Abraham Construction v. Armco Steel Corp.,* 559 F.2d 250, 253 (5th Cir. 1977.) I reversed myself and ruled that there was no waiver. (5:795–796.) The concept is discussed in *In Re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 922 (and in the dissent at 939–940) (8th Cir. 1997), and in R. W. Higgason, *The Attorney-Client Privilege in Joint Defense and Common Interest Cases,* 34 The Houston Lawyer 20 (No. 1, July-August 1996.)

[3] References to the 24-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's, CPX for the Union's, and RX for Respondent PDI's. The references are intended only as an aid, not as an exhaustive listing.

[4] All dates are for 1994 unless otherwise indicated.

2. Pretrial rulings not "law of the case"

Several pretrial rulings were made by a different administrative law judge. I refer to these as pretrial rulings by the motions judge, as distinguished from the trial rulings by me as the presiding, or merits, judge. By its pretrial motion dated March 28, 1996, PDI sought disclosure of the authorization cards. Oppositions were filed by the General Counsel and the Union. By his order of April 3, 1996, Associate Chief Judge William N. Cates denied PDI's motion. At trial PDI renewed its motion. (6:830-834.) Apparently through oversight, these documents as to the authorization cards were not included in the formal papers or otherwise introduced as exhibits. Because the motion as to the authorization cards received some attention during the trial, I now include copies of the documents in the formal papers, marking the copies as GCX 1(u) [PDI's March 28 motion], GCX 1(v) [Charging Party's April 1 opposition], GCX 1(w) [General Counsel's April 2 opposition], and GCX 1(x) [Judge Cates' April 3 order].

Pretrial rulings and other interlocutory orders ordinarily are not considered "law of the case" restricting the presiding, or merits, judge. See *Langevine v. District of Columbia,* 106 F.3d 1018, 1022–1023 (D.C. Cir. 1997); *Sagendorf-Teal v. County of Rennsselaer,* 100 F.3d 270, 277 (2d Cir. 1996); *In Re United States,* 733 F.2d 10, 11–13 (2d Cir. 1984) (at 13, quoting Judge Learned Hand.) There can be exceptions, as stated in *In Re Air Crash Disaster,* 96 F.3d 498, 539 (6th Cir. 1996.) Similarly, a ruling by a circuit court motions panel is not law of the case restricting the merits panel. *Stifel, Nicholas & Co. v. Woolsey & Co.,* 81 F.3d 1540, 1543–1544 (10th Cir. 1996.)

When considering motions to renew a pretrial motion already ruled on by a motions judge, presiding ALJs usually reaffirm the pretrial ruling. For example, see *Riverdale Nursing Home,* 317 NLRB 881 at 881 (1995), and *Harmony Corp.,* 301 NLRB 578, 587 fn. 9 (1991.) And that is what I did at trial, citing (4:538; 6:836-837), among other grounds, *National Telephone Directory Corp.,* 319 NLRB 420 (1995) (identities of card signers who are employees is a forbidden topic for cross examination.)

3. Jencks[5]

The General Counsel's second witness was Office Manager Luisa Pacheco, an acknowledged supervisor, who was questioned under FRE 611(c.) (2:152.) When the General Counsel completed the Government's direct examination, and passed the witness, the Union's attorney, UNITE's Brent Garren, requested production of Pacheco's pretrial affidavit in the possession of the General Counsel. PDI objected. (2:269.) Relying on the lead case, closest to this point, of *Senftner Volkswagen Corp.,* 257 NLRB 178, 178 fn. 1, and 186–187 (1981), enfd. 681 F.2d 557, 110 LRRM 3190 (8th Cir. 1982), and arguing that he needed the affidavit for impeachment purposes inasmuch as the Union would be arguing that Pacheco had presented a pretextual case against alleged discriminatee Vivian Fortin, the Union contended that it was entitled to production of Pacheco's affidavit under the rationale of *Senftner*. (2:269, 271, 275–276.) The General Counsel agreed with the Union. (2:277, 280.)

Noting that the situation was something of a hybrid (2:274, 276), and also observing (2:273) that the situation was not any kind of hypothetical sham effort by the Government to call a witness, ask a couple of questions, and then pass the witness just so the Union could ask for the affidavit (I stress the extremely hypothetical nature of such a possibility), I ruled that Pacheco's affidavit should be produced. (2:280.) After certain redactions were made by the General Counsel, the Government produced Pacheco's affidavit. (2:283.)

I reaffirm my ruling. The Board's Rule, 29 CFR 102.118(b)(1), calls for such production after a witness has been called by the General Counsel. In practice the rule has been interpreted as not including production, to a charging party, of affidavits of friendly witnesses called by the Government because the charging party (who usually already has a copy of those affidavits) is not in the position of needing to impeach a friendly witness. The rationale of *Senftner Volkswagen* is that a charging party, being a full party, is entitled to production when the circumstances suggest that the charging party may need to impeach the witness. There is no doubt that the Union here needed to impeach Pacheco—an adverse witness to both the General Counsel and the Union—for Pacheco's testimony, if credited, would severely damage Fortin's case. As Judge Robert E. Mullin wrote in *Senftner,* Section 102.118 of the Board's Rules "is not to be read as denying a charging party the right to a pretrial affidavit, but rather to be read as making clear the right of a respondent to have access to such an affidavit in the possession of the General Counsel." *Senftner,* id. at 187. Accordingly, I reaffirm my trial ruling granting the Union's motion for production of the pretrial affidavit of the General Counsel's FRE 611(c) witness, Luisa Pacheco.

4. Forged documents and courtroom experiments

As discussed later in more detail, the Union called Lillian Newman, as a handwriting expert, for the purpose of establishing the genuiness of certain union authorization cards by comparing the card signatures with the signatures on W-4 forms or other exemplars. Although my summary here is a bit lengthy, the issue discussed affects a substantial portion of the case.

During PDI's cross-examination of Newman, PDI, over objection (16:2531) by the Union, showed the witness an unidentified document (RX 13.) Newman testified that, in her opinion, the same person who signed RX 13 also signed GCX 35, CPX 8, and GCX 12–52. (16:2532-2533.) PDI did not then offer RX 13. On its face, RX 13 appears to be a PDI payroll form ("Employee Open Account Agreement"), dated November 6, 1993, and signed by Robert Alegria. At the conclusion of Newman's testimony, and still not satisfied that Alegria's purported authorization card (GCX 12–52) had been authenticated, I rejected it and granted the requests of the General Counsel and the Union that GCX 12-52 be placed in the rejected exhibits file. (16:2585; 17:2598.)

On the last day of trial, and near the close of its own case in chief, PDI called William "Wayne" Black as a witness. A licensed private investigator, Black operates his own Florida firm, Black & Associates. (23:4098.) The evening of Septem-

[5] See *Jencks v. U.S.*, 353 U.S. 657 (1957); 18 USC 3500; *Delta Mechanical,* 323 NLRB 76, fn. 3 (1997.)

ber 16, some 3 weeks before his October 8, 1996 testimony, Black, apparently by prearrangement, went to the office of PDI's attorney, Charles S. Caulkins. Supplied a purported copy of the W-4 form of Robert Alegria (whom Black does not know), Black practiced Alegria's signature three or four times before forging Alegria's signature on a blank PDI form and then completing the balance of the form. Black testified that he would be able to identify the document which he had forged some 3 weeks earlier in the lawyer's office. (24:4098–4099.)

At that point the Union objected that the matter was irrelevant because Alegria's card was not in evidence. Apparently adopting ("Also") the Union's relevance objection, the General Counsel additionally objected on the basis that it would be improper to allow such testimony when Newman, the Union's handwriting expert, had not been confronted with this information on cross examination and given the opportunity to respond. (24:4099.) I then excused witness Black and inquired as to the purpose of Black's testimony. Informed that the purpose was to impeach Newman by Black's testifying that it was he (not Alegria) who had signed RX 13, I ruled that I would not permit such evidence because it violated federal courtroom procedure in that it was an experiment not taken in "open court" using "planted" evidence, "And I won't permit it." (24:4100-4101.)

Respondent's offer of proof (that Black would identify RX 13 as being in his hand) was supported by PDI's four-fold argument urging receipt of the evidence. *First,* Black's testimony shows that Newman's testimony is untrustworthy and confirms PDI's earlier motion (16:2408) that Newman not be permitted to testify as an expert. *Second,* Black's testimony is offered to show that Newman, as an expert, is not competent. *Third,* that all cards admitted based on Newman's testimony should be rejected. *Fourth,* it is not appropriate for the ALJ to authenticate authorization cards by comparing the signatures on them to those on W-4 forms. (24:4101-4102.) Unpersuaded, I reaffirmed my ruling, denied the motion to permit Black to so testify, and, on request, placed RX 13 in the rejected exhibits file. (24:4102.)

After a conference call I held with the parties on October 10, 1996, PDI filed its motion of October 24, 1996 that I reconsider my ruling. I did so, and by order (which, at PDI's request, I now insert in the record as RX 50) dated December 3, 1996, I reaffirmed my trial ruling.

In their arguments on PDI's motion for reconsideration, the parties argued forcefully. Respondent PDI cited law texts in support of its argument that its courtroom test of Newman was proper: McCormick, *Evidence* Section. 215 at 24 (4th ed. 1992); *Weinstein's Evidence* Section. 901(b)(3)[03] at 901-53 (1991); and Graham, *Handbook of Federal Evidence,* Section. 901.3 at 700 (4th ed. 1996.) The Union cited cases such as *State v. Maxwell,* 102 P.2d 109, 115 (Kan. 1940) which hold that only genuine specimens may be used during cross examination to test the witness. In any event, these authorities, and others cited by Respondent and the Union, acknowledge, even assert, that the test must be fair. And even the authorities allowing the cross examiner to use false documents in such a test provide, as stated by one case cited by PDI, that "the scope and limit of such cross-examination must be left largely to the discretion of the trial court whose ruling will be rarely disturbed." *Adams v. Ristine,* 122 S.E. 126 (Va. 1924.)

My trial ruling refers to federal courtroom procedure. An example of that authority is reflected in Rule 19 Appendix C, rule L, of the Local Rules, United States District Court, Southern District of Texas. As published at 1994 Texas Rules of Court–Federal 315, 321, 326–327 (West Pub. Co. 1994), rule L provides:

> L. Conduct no experiment or demonstration without permission.

Before embarking on his courtroom experiment (presenting a false document to witness Newman to test her competence as a handwriting expert), counsel for PDI did not first request a bench or chambers conference in order to seek permission to conduct such an experiment. At such a conference the General Counsel and the Union would have had the opportunity to suggest fairness safeguards. These may have included either advising Newman that RX 13 was a questioned document rather than an admitted specimen, or that Black submit one or more forged signatures on some other form, even blank sheets of paper, rather than on a company form. Or it may be that, after discussion and argument, I would have approved the procedure which PDI contemplated and attempted.

Evidence obtained either secretly or without notice is presented all the time in trials. Examples include secretly made tape recordings of telephone or face-to-face conversations, or recordings secretly made of a manager's statements at group meetings. There are many such NLRB cases. EEOC cases involving "testers" occasionally are in the news. There are "salting" cases and police "sting" operations. The list no doubt could be extended. All these examples, however, involve evidence developed outside the courtroom and presented to the trier of fact. The "sting" does not include using (without permission) the courtroom.

The point is that PDI's counsel, an officer of the court, sought to bypass the presiding judge during a trial in order to conduct an experiment with a witness. No party may so do. Although rule L, quoted above, is not a regulation of the Board, it is consistent with traditional Board procedure. After considering the arguments presented, I reaffirmed my trial ruling, and I denied PDI's motion that I reopen the trial to receive Black's testimony and RX 13. On brief (at 91) PDI adds an additional ground—that my ruling was fundamentally unfair because it imposed a "discovery-like requirement of advance notice" regarding Black's testimony after PDI had cooperated with the Government during the investigative stage of the case and provided discovery materials with no discovery in return. Finding that comparison misapplied here, I reject it.

In any event, I adopt here the following lines from my order of December 1996 (RX 50 at 5):

> Additionally, as the General Counsel and the Union argue, the matter is mostly irrelevant because Alegria's purported authorization card resides in the rejected exhibits file. PDI therefore seeks to impeach Newman overall based on the proposed impeachment as to a collateral issue. Newman's expertise is not a collateral issue, but that expertise may not be attacked through rejected evidence.

B. PDI's Operations and Senior Management

A Florida corporation (GCX 17), with its corporate office at Roanoke, Virginia (2:237), PDI sells automotive replacement parts (the "after-market") at wholesale (20:3486–3487) from 11 warehouses, or distribution centers, located from Maine to Florida (17:2734.) Of the 11 warehouses, 4 are "full service" operations—"host" or primary warehouses that ship. The remaining seven are smaller satellite, or branch, warehouses where customers pick up ("pick-up" facilities) their orders. The four host warehouses are located at Westbrook, Maine; Roanoke, Virginia; Tampa, Florida, and Miami, Florida. (17:2734.) Only two of the facilities are involved here—Miami (a primary warehouse) and Ft. Lauderdale (a branch.) As I discuss in more detail later, in July 1994 the two facilities employed slightly over 100 employees.

PDI's November 1991 *Employee Handbook* reports that PDI has been in business since the early 1950s and that, in 1986, Rollance E. (Rollie) Olson purchased the company. (RX 40 at 3.) Olson's title at PDI is Chairman. (RX 40 at 1; 20:3525-3526.)

Peter Bassett has a major part in this case. During May-September 1994 Bassett was president of PDI's Florida Division and was a corporate vice president. (11:1816; 17:2659; 20:3486, 3844; 23:4082, Bassett.) For some time, unspecified in the record, Chairman Olson had also been serving as PDI's president (20:3526), and was the person to whom Bassett reported (22:3868.) Bassett transferred to the corporate headquarters at Roanoke, Virginia about September 1994. (22:3832, 3844; 23:4082.) Under Bassett, the Florida Division consisted of a primary (host or full service) warehouse in Miami and one in Tampa, with branch warehouses in Ft. Lauderdale, Ft. Myers, and Orlando. (20:3486.) Between his designation on the first day of trial (April 22, 1996) as PDI's designated assistant exempt from sequestration (1:60), and his brief testimony as my witness on August 26 (11:1815), Bassett had left his employment with PDI. (11:1816.)

Before September 1994, Mark Noble was the corporate Vice President of Northern Operations for PDI. He was the counterpart to Bassett who held the same corporate position for the Southern Operations. (17:2735, 2820, Noble.) Noble's territory consisted of Roanoke, Virginia and Westbrook, Maine, and their branch warehouses. (17:2735.) About June 1, 1994, give or take a week or so, PDI hired Al Woods as its new president. (17:2736, 2820; 22:3923.) Woods restructured PDI's managerial format from geographical to functional. As a result of the restructuring, in September 1994 Noble became Vice President of [all] Warehouse Operations, and Bassett was transferred to the Roanoke headquarters as a vice president there. (17:2733–2736, 2785, 2820.) As I discuss later, Woods reportedly concluded that PDI was overstaffed and unproductive. To improve PDI's bottom line, Woods sought cost reductions in methods and payroll. (17:2737–2740, Noble; 22:3923-3924, 3929–3934, Bassett.) The first axing of Miami personnel occurred about August 11 when 25 employees were cut from the payroll. (23:4072, Bassett.)

C. The Union Organizing Campaign

1. Overview

On May 13, 1994 the Amalgamated, by Florida District Director Monica Russo, filed a petition (GCX 4) in Case 12–RC–7736 to represent PDI's Miami warehouse employees and drivers. (1:92-93; 6:850.) When the parties assembled for the June 1 representation hearing, they signed a stipulated election agreement (GCX 17) providing for an election to be conducted July 7 and 8, 1994 (5:760) in the following stipulated unit:

> All warehouse employees, customer service employees, truck dispatcher, and drivers employed by the Employer at its Miami and Ft. Lauderdale, Florida warehouses, excluding office clericals, technical employees, professional employees, supervisors, and guards as defined by the Act.

When the voting was complete on July 8, and the ballots counted, the Union was behind 46 (against) to 40 (for), but the 13 challenged ballots were determinative. The Union filed objections. (GCX 1(k) at 2.) Eventually, on October 11, 1995, the Regional Director issued an order (GCX 1(k)) directing a hearing on the objections and challenged ballots and consolidating for trial the representation case with the two unfair labor practice cases involved here.

The Union's organizing began the evening of Monday, May 9, 1994 when Monica Russo met with several of PDI's employees at the Tip Top Cafe. (1:71; 5:704; 6:843; 15:2262.) At that meeting Russo spoke, cards were signed, and the Union's organizing campaign was launched. According to Bassett, he did not learn of any organizing activities until May 11 when Warehouse Manager Bill Beaman told him there were rumors in the warehouse that union authorization cards were being signed. (20:3528; 22:3876, 3884.) When the employee organizers expressed concern to Russo that someone was reporting events to management, Russo prepared (1:75-76; 6:845-846, 849), and Ronald Casco (6:942–943; 8:1248) assisted with the translation for the Spanish version, a May 12 letter (GCX 2a,b), signed by several employees, announcing to Peter Bassett and to PDI that a majority of the Miami employees had signed cards for the Union, and alerting PDI that the employees were aware of their rights under federal law. A supplemental letter (GCX 2c,d) was prepared a week later. The exact date or dates of delivery of these letters is not shown in the record. However, the parties stipulated that the May 12 English version was received by PDI sometime in May 1994. (1:79, 83.)

On receiving a copy of the Union's petition on Monday, May 16, Peter Bassett promptly contacted his business lawyer. (20:3569.) [Bassett so testified, but I later make certain findings which qualify that testimony.] That contact resulted in attorney Charles Caulkins meeting that evening with Bassett and other managers and supervisors. (18:2842, 2918; 20:3375, 3417, 3570; 23:3947.) At this meeting attorney Caulkins instructed management on how managers and supervisors were to conduct themselves during a union organizing campaign. The "Don'ts" portion of the instructions is known by the acronym "TIPS," meaning do not (in the verb form): Threaten, Interrogate, Promise, or Spy. (20:3376.) From papers attorney Caulkins distributed, Bassett, without changing the contents,

copied the TIPS instructions and examples onto a memo form (RX 41) bearing the PDI logo. (20:3589, 3624, 3635.) About late May, in conjunction with a second TIPS meeting, which he conducted with managers and supervisors, Bassett declared TIPS to be a statement of company policy. (20:3589.)

The next day, May 17, Bassett delivered a prepared speech (RX 32), in sessions, to groups of employees. (20:3570-3573.) This was the first of five speeches which Bassett delivered to employees before the July election. (20:3610.) Bassett delivered the other four prepared-text speeches on: June 14 (RX 33); June 22 (RX 34); June 29 (RX 35); and July 6 (RX 36.) Beginning with his second speech, Bassett also showed four videos, one set in English (RXs 15-18) and one set in Spanish (RXs 19-22.) All the speeches were interpreted for the benefit of Spanish-speaking employees. Copies of the texts (English and Spanish) of Bassett's five speeches are in evidence (RXs 32-36, English), as are transcripts (RXs 23-26, English) of the statements on the four videos.

Copies of the videos themselves are not in evidence. The copyright owner, Projections, Inc. of Norcross (Atlanta), Georgia, refused Bassett's request that PDI be permitted to purchase copies of the videos for the record. (17:2667, 2670; RX 14.) I granted (21:3756) Projections' petition to revoke PDI's subpena duces tecum. Over objection by the General Counsel and the Union, I received in evidence transcripts of the videos. (23:3960, 4058.) The complaint does not expressly attack any part of the prepared texts or videos. At trial the General Counsel stated that the complaint attacks what was said. (23:4056-4058.) The parties dispute what was said. So far as the record shows, neither PDI nor any employee tape recorded any of the meetings at which Bassett spoke and showed the videos.

2. Objections

Before trial the Union withdrew 3 of its 17 objections (GCX 1(k) at 3), and at trial it withdrew several others (1:15-16), excepting Objection 16(a), for the purpose of expediting the proceeding by leaving as pending only those objections which (aside from 16a) parallel allegations in the complaint. (1:15-16.) Although the Union did not specify Objection 17 ("other acts") among those enumerated as withdrawn, I find that to have been mere inadvertence in light of the purpose of the withdrawal, and I therefore find that the Union also withdrew Objection 17.

Objection 16(a) pertains to a ballot (CPX 1.) Because the ballot was marked in both the Yes and No squares, the Board agent counted it as a No vote. The Union's representative objected. (6:917.) I later discuss Objection 16(a.)

3. Challenged ballots

At trial the Union and PDI resolved the challenged ballots by the following agreed disposition:

1. The Union withdrew its challenge to the ballots of Sookdeo Choon, Diane Hinton, and Jack Hinton Jr., and their ballots shall be counted. (24:4198.)

2. The voter eligibility list (GCX 5) should have contained, as eligible voters, the names of Otilio Delvie, Zenaida Requejo, and Annia Vigos. (24:4198–4199.) Thus, their ballots shall be opened and counted.

3. The names of Roberto Duarte, Ruben Garcia, Antonio Rodriguez, and Sergio Ruiz should have been included on the voter eligibility list (the "VEL".) (24:4200.) As they did not vote, however, even on challenged ballots (24:4200), they have no challenged ballots to open and count.

4. Finally, challenges are sustained and the challenge envelopes shall not be opened nor the ballots counted respecting Glenis Alleyne, Donnette Hawley, Elizabeth Kent, Robert Ortega, Wallace Penzing, Manuel Rodriguez, and Cheryl Townsend. (24:4200–4204.)

D. Credibility Resolutions

As the following findings reflect, I do not totally credit the witnesses of one side over the witnesses of the opposing side. The Government's employee witnesses seemed quite sincere, and, except as to Bassett's speeches, I generally credit them.

E. Alleged 8(a)(1) Coercion

1. Introduction

Complaint paragraphs 5 through 10 describe incidents of conduct by five managers or supervisors. The complaint alleges that such conduct violated Section 8(a)(1) of the Act. In the great majority of instances, Florida Division President Peter Bassett is named, in paragraph 5, as the perpetrator. Bassett allegedly began about May 9 by interrogating employees, and quickly progressed to threats, both implied and express, and to other alleged violations.

Fleet Supervisor Robert Williamson is named in Complaint paragraph 6 as committing three violations, Office Manager Luisa Pacheco one (par. 7, a threat), Leonel Belaunzaran, Beaman's successor, one (par. 8, a threat), and Supervisor Hector Ortiz, two (pars. 9 and 10, a threat and an offer of benefit.) PDI denies.

2. Peter Bassett's individual conversations

a. May 9 and 12, 1994

(1) Introduction

Complaint paragraph 5(a) alleges that, about May 9 and 13, 1994 at PDI's Miami warehouse, Bassett "interrogated employees about their support for, and activities on behalf of the Union." Paragraph 5(b) alleges that, about May 9, Bassett "impliedly threatened employees with warehouse closure if they selected the Union as their collective bargaining representative." Driver Jose Castro testified in support of paragraph 5(a), and alleged discriminatee Vivian Fortin testified in support of paragraph 5(b.) The General Counsel also relies on the Fortin conversation to support complaint paragraph 5(c) which alleges an offer to improve working conditions for employees "if they withdrew their support for the Union."

(2) Jose Castro

(a) Facts

During the first part of May 1994, Castro's direct supervisor was Fleet Supervisor Robert Williamson. (12:1832; 20:3373.) In turn, Williamson reported to the warehouse manager, Bill Beaman. (18:2953; 22:3847-3848.) Beaman reported to Operations Director Jack Jenkins. (18:2954; 22:3845.) Jenkins reported directly to Bassett. (18:2954; 22:3845.) Bassett dis-

charged Beaman on May 13. (20:3530; 22:3844; 23:4029.) Beaman's departure soon became common knowledge, and receiving clerk Leo Belaunzaran, who had been the warehouse manager at his former employer, submitted his resume to Operations Director Jenkins. Belaunzaran interviewed with Human Resources Director Robert Tennant (Belaunzaran told Tennant he had signed a union card) and then with Bassett. About May 25, Florida Division President Bassett promoted Belaunzaran to Miami's vacant warehouse manager's position. (18:3035, 3044–3048, 3106-3108, 3115.)

Shortly after 9 the morning of May 9, driver Castro testified, Bassett called Castro into his office. Already present were Operations Director Jenkins and Office Manager Pacheco. Bassett spoke to Castro in English, and Pacheco interpreted the conversation. (11:1777–1779, Castro.) Through Pacheco as the interpreter, Bassett asked Castro what was happening between Bill Beaman and the drivers. "Nothing" as between Beaman and the drivers, Castro responded, but it was "the whole warehouse, the whole company, who did not want to know anything about Mr. Bill Beaman." [By his answer, Castro apparently meant that the employees viewed Beaman as an unjust manager and wanted nothing to do with him.] Bassett told Castro not to worry about Beaman's firing anyone or disciplining employee because henceforth he, Bassett, would make the [personnel] decisions. (11:1779–1780.)

Bassett then asked Castro if he knew something about the Union. Castro replied that he knew nothing. "Remember what happened to Eastern Airlines," Bassett responded. "Because they let the union in, they went bankrupt." Castro said that Eastern had gone bankrupt because of the high salaries the employees were making, and that if employees at PDI received better treatment or better salary, perhaps the union would not come in. (11:1780.)

I do not credit Bassett's denial. (20:3526–3527.) I note that, although he denies referring to Eastern Airlines during this meeting (22:3883), Bassett concedes (22:3884) making the reference during one of his speeches. That was Bassett's fourth speech (RX 35), delivered in Miami on June 29, 1994. (21:3733.) As the text records, Bassett there stated (in referring to a news article about some 700 striking members of the Amalgamated in New Jersey who had been permanently replaced) (RX 35 at 7):

> This is one specific example of what can happen with unions.
>
> We have seen this before right here in our community.
>
> Everyone remembers Eastern Airlines.
>
> It has devastated not only the jobs that were directly provided by Eastern but all of the other businesses that used to be up there on 36th Street. We all know people in this community who were devastated.

Jenkins did not address the incident when he testified. Pacheco denies being present at any conversation between Bassett and Castro regarding the Union, denies interpreting at any such conversation or any conversation mentioning Eastern Airlines, and denies interpreting for any conversation between Bassett and Castro during any part of 1994. (19:3247-3248, 3289-3290, 3311.) Pacheco, who interpreted at the June 29 speech (19:3234; 21:3741), and signed a form to that effect (19:3232-3234; 21:3741-3742), also testified, on cross-examination by the Union (19:3312):

> Q. Now, did you hear Mr. Bassett talk to any other employee about Eastern Airlines?
>
> A. No.
>
> Q. Did you hear Mr. Bassett talk to any other employee about unions and companies going bankrupt?
>
> A. No.
>
> Q. Did you hear Mr. Bassett talk to any other employees about that unions devastated Eastern Airlines?
>
> A. No.
>
> Q. Did you hear Mr. Bassett talk about the effect on the entire Miami area of unions putting Eastern Airlines out of business?
>
> A. No.
>
> Q. And, again, I'm not talking about exact words here but the content.
>
> A. I understand, but no.
>
> Q. You never heard that?
>
> A. No.

In giving her quoted answers to the first two questions, Pacheco possibly could have been thinking in terms of individual conversations rather than Bassett's speech to sessions of assembled employees on June 29. Still, it would seem that on the third and fourth questions she would have recalled Bassett's June 29 comments about Eastern Airlines. In any event, I credit Castro.

The portion of Bassett's version which I do credit is that even before May 9 he had received hints from employees that Beaman was mistreating ("causing problems with") drivers and warehouse employees. (20:3522; 22:3875.) Not until Bassett associated the presence of the Union with Beaman's mistreatment of employees, I find, did Bassett decide to fire Beaman.

In crediting Castro, I have not overlooked PDI's argument (Brief at 44) that Bassett could not have mentioned the Union the morning of May 9 when it was not until that evening that the Union held its first card-signing meeting with employees. Before any such meeting is held, however, there are preliminary events. On that point the evidence is rather brief. Union Representative Monica Russo testified that in (early) May 1994 she was contacted by Fernando Cribeiro, a union member who worked for a company other than PDI. Cribeiro, it appears, worked with the father of PDI driver Osberto Jerez. Cribeiro told Russo that some employees wanted to inquire about getting a union at PDI because, in their view, the employees at PDI had a lot of problems. Russo told Cribeiro to arrange a meeting. The first meeting was held the evening of May 9, 1994 at the Tip Top Restaurant. (1:70–71; 6:842; 15:2262.) Former (13:2092) driver Osberto Jerez testified that he helped arrange the meeting. (13:2110.) Former (12:1876) warehouse employee Roberto Duarte testified that coworkers told him about the Union and invited him to attend the first meeting on May 9. (12:1878, 1880, 1969.) Although the timing is short, it clearly is possible that supervision heard about the discussion of a first union meeting and reported this up the management chain to Bassett. Thus, when Bassett asked his question of Castro the

morning of May 9, he already knew more about the union organizing than did Castro.

PDI also argues (Brief at 44) that Bassett's supposed remarks about Eastern Airlines do not withstand scrutiny because the timing is artificial since Bassett did not refer, in his speeches, to Eastern until his fourth speech, the one on June 29, and the context of the May 9 conversation does not fit with any reference to Eastern Airlines. But the context does fit. After having assured Castro that he need not worry about Warehouse Manager Beaman, Bassett simply wanted to capitalize on this opening in order, first, to interrogate for information, and then to plant the first seed for doubt about the wisdom of bringing in a union. Indeed, that doubtlessly was why Bassett called Castro into his office in the first place. I credit Castro.

(b) Discussion

Bassett's May 9, 1994 interrogation of driver Castro would tend to be coercive. Not only was the situation three managers to a single employee, and in Bassett's office, but Bassett was PDI's highest ranking Florida official—four levels above Castro. Moreover, there is no evidence that Castro was wearing any union insignia or had openly declared himself in favor of the Union or of any union. It was not until the following day, May 10, that Castro signed an authorization card (GCX 12–35) for the Union (11:1777, 1781; 12:1843), and he was one of several employees who signed the letters (GCX 2a–2d, English and Spanish), dated May 12 and 19, to Bassett announcing the Union's organizing drive. (11:1786; 12:1841.)

By his question, Bassett sought to obtain information about the extent of the Union's organizing, and this was followed by the statement about Eastern Airlines. Had Bassett posed the question during an individual conversation on the loading dock, there possibly would have been no violation. Under the circumstances of three on one in the office of the president of the Florida Division, with an employee who in fact had not signed for the Union and was not an open advocate for the Union, Bassett's question was coercive. PDI, I find, violated Section 8(a)(1) of the Act by Division President Peter Bassett's May 9, 1994 interrogation of driver Jose Castro, as alleged in complaint paragraph 5(a.)

Contrary to complaint paragraph 5(b), I find no implied threat of plant closure in Bassett's reference to Eastern Airlines. Castro himself connected the bankruptcy to high salaries, not to any sophisticated action by Eastern Airlines to deplete assets and file for bankruptcy in some devious scheme to escape its unions. Thus, an employee such as Castro would not reasonably have understood Bassett to be implying that PDI would act unilaterally in a manner to cause bankruptcy, and close, in some suicidal effort to escape the Union. I therefore shall dismiss complaint paragraph 5(b.)

(3) Vivian Fortin

During much of 1994 Vivian Fortin was working as a customer service representative primarily handling the Metro Dade account. On May 10 Fortin signed (8:1330, 1372; 9:1388, 1508) a union authorization card. (GCX 12–20.) About May 12, around 7:30 a.m., Bassett summoned Fortin to his office. Once Fortin was there, Bassett asked whether she had heard any union rumors. "Yes," she replied. To Bassett's inquiry of what he could do to stop the Union, Fortin said she did not know. Would getting rid of (warehouse manager) Bill Beaman stop the Union, Bassett asked. Again Fortin said she did not know. The conversation apparently ended at that point. (8:1330–1331; 9:1542–1543.)

I do not credit Bassett's version that he had two conversations with Fortin, one on May 10 and a second on May 12, and that in the latter he told Fortin he had decided to terminate warehouse manager Beaman and that there was union organizing in the facility. (20:3521-3525, 3529-3530; 22:3876-3881.)

As I summarize later, Fortin soon became open, obvious, and very public in her support of the Union. But all that came after May 12. Thus, Bassett was unaware that Fortin had signed a union card when he met with her on May 12. Bassett had spoken with Fortin many times over the years. He "trusted" Fortin. (20:3524.) The General Counsel (Brief at 93-94) advances no theory on how the conversation can be characterized as a coercive interrogation. Finding no coercion, and no violation of Section 8(a)(1), I shall dismiss complaint paragraph 5(a) respecting the May 13, 1994 date (the May 12 conversation.)

Respecting complaint paragraph 5(c), the offer of benefit, I agree with the General Counsel (Brief at 101) that Bassett's inquiry of Fortin whether the union movement could be stopped if Bassett got rid of warehouse manager Beaman (the major cause for the employees seeking out the Union) constitutes an unlawful offer to improve working conditions in violation of Section 8(a)(1), as alleged. I so find.

3. Bassett's speeches

a. Introduction

To address Bassett's speeches, the General Counsel presented six employee witnesses: Ronald Casco, Jean Claude Demosthene, Ronaldo Hernandez, Aundrai D. McGregor, Albert Rosado, and Angela O. (Lampin) Wilson. PDI countered with the testimony of Peter Bassett (former Florida Division President), Jack Jenkins (former Operations Director), Office Manager Luisa Pacheco, Warehouse Manager Leo Belaunzaran (a receiving clerk until about May 25, 1994), and nonsupervisory employees Beverly Johnson (a warehouse supervisor during the relevant time), Sarah Mitchell, Barbara Shaw, and Ernest Thomas. Other witnesses called by the parties made an isolated reference to matters pertaining to the speeches.

Memories of Bassett's speeches were adversely affected by the passage of time between May-July 1994 and the April 1996 start of the trial in this case. Indeed, some of PDI's witnesses did not testify regarding the speeches until October 1996. As noted, it appears that no one tape recorded any of the speeches and videos. Aside from the written texts of the speeches, and the transcripts of the video narrations, and the notations on cover pages by management attendees such as Jenkins, verifying that the speeches were delivered as written, no contemporaneous notes were made by any witness. Although privately rehearsing for his first speech, Bassett thereafter rehearsed his speeches with his management team before addressing the employee groups.

For the speeches PDI arranged staggered sessions with employees usually numbering from 10 to 20 per group. For each of his five speeches, Bassett addressed some half dozen ses-

sions of employee groups. Although no employee attendance roster was prepared for any of the speeches, speeches two, four, and five have attached, to the exhibits, lists of employees scheduled to attend that speech. Because of production needs or other problems, changes were made. Even though the lists are not fully reliable as attendance rosters, they add some confirmation to testimony about names of attendees.

As earlier noted, Bassett delivered his five speeches, and showed the four videotapes, as follows:

Speeches	Video Titles
1. May 17, 1994	
2. June 14, 1994	Promises, Promises, Promises
3. June 22, 1994	2. Let's Make A Deal
4. June 29, 1994	3. Job Security—Union Style
5. July 6, 1994	4. 25th Hour

Bassett testified that he wrote the speeches in advance, typing them on his computer using WordPerfect plus other software titles. (20:3571, 3605-3607, 3634; 21:3727; 23:4039.) By the rehearsals with his management team, Bassett polished his delivery and elicited questions which might arise during the speeches. (20:3573, 3587.)

Bassett is very experienced at public speaking, dating back to his being a reader at his church and extending through addresses to various industry associations, forums, and committees. (20:3587-3588.) Experienced using the TelePrompTer, Bassett strove to simulate use of a teleprompter in delivering these speeches to PDI's employees. Thus, he used a large type font and, attempting to improve on his WordPerfect techniques after the first speech, sought to use the top half of the page so that, when glancing at the written text, his head and eyes would not have to bend toward the bottom of the page. Bassett wanted to avoid the appearance of "bland reading." (20:3606-3607.)

As the exhibits reflect, Bassett was successful only about half the time in keeping the text on the top half of the pages. Despite Bassett's reputation as a computer "guru" (20:3634) because of his knowledge of computer programs, his expertise does not include one item of basic computer skill—knowing how to insert a page break. (23:4039-4042.) The only relevance here of this fact is that it bears on Bassett's assertion that certain gaps in the speech texts are not the result of after-speech tampering, but the result of his starting new pages by pressing the Enter key to "drive down" or "force down" the next line to the top of the next page where he would begin the next paragraph. (21:3732; 23:4039-4041.) While the bigger gaps are at the bottom of some pages, some small gaps appear elsewhere.

The steps Bassett took enabled him to deliver the speeches without actually reading from the script in his hand. He would glance at the page and back to the audience, in the fashion of using a teleprompter. (20:3606.) At trial Bassett twice demonstrated his skill at this process. (21:3765-3770; 23:4075-4077.) His demonstrations suggest that, in making a public speech, Bassett indeed is skillful in maintaining eye contact with the audience between glances at a prepared script.

Other than a few testimonial references to the images shown on the videos, the transcripts of the videotapes constitute our only evidence of the content of the videotapes. Repeating my earlier statement, copies of the videos themselves are not in evidence. As also noted earlier, the General Counsel explained that the Government attacks what was said. (23:4056–4058.) On brief the General Counsel and the Union, relying on the testimonial evidence to argue deviation from the written texts, make no contention that the texts of the speeches (and, indeed, of the transcripts of the videos), even as written, constitute, overall, a threat of loss of jobs in the event of unionization—all as alleged in the complaint.

In any event, it is clear that, in countering the Union's organizing campaign, PDI launched a massive counter attack. If phrased in terms of war, PDI's response was equivalent to America's B-52 carpet bombing of the Iraqi front line forces at the 1991 opening of "Desert Storm" in the Persian Gulf War. As the Iraqis stumbled from their trenches begging the advancing United States soldiers to accept their surrender, so too, figuratively, the PDI employees, shell shocked from the long series of verbal "carpet bombing" speeches and videos, would have stumbled toward the voting booths, begging for the chance to vote against the Union.

This is not to say that the speeches and videotapes, considered together, constitute a threat by PDI that PDI would retaliate by forcing a strike (by not agreeing to a contract so that a strike would ensue and PDI could permanently replace economic strikers[6]) should the employees be so unwise as to vote in the Union. Even if lawful, however (because of occasional statements that PDI would bargain, although hard, that strikes do not always occur, and no express threat to fire strikers), the theme repeatedly pounded into the heads of the audience is that where there are unions there are problems, no job security, and strikes, with strikers (and usually no reference to the type of strike) frequently being permanently replaced. For all practical purposes, the theme continues, the strikers lose their jobs to those replacements. The way to avoid such dire consequences is both simple and important: vote NO. Turn now to the written texts of these speeches and videos. (As I discuss later, the extensive mass of speeches and video transcripts is an important factor in resolving credibility. Accordingly, I summarize the speeches and video transcripts in detail.)

b. May 17, 1994

The written text of this speech is placed on eight pages. (RX 32.) Because of the large font and liberal spacing between some paragraphs and pages (what can appear as "gaps" at certain points), if the document were single spaced, with normal spacing between paragraphs and pages, it probably would be no more than about two pages in length.

After an opening greeting, the first point made is that Bassett wants to talk with the group about a "very important subject." "Yesterday," Bassett advises, PDI received notice that a petition had been filed by the Union. The Union says it wants to make employees "dues payers" and to be the exclusive representative in dealing with PDI. Bassett points out that he has asked "Luisa" [Pacheco] to be there so she can translate Bassett's comments into Spanish, and for him to translate what he

[6] See *Overnite Transportation Co.,* 296 NLRB 669, 670 (1989), enfd. 938 F.2d 815 (7th Cir. 1991.)

just said. Then, "You may ask—'Why is he reading this speech??'" The answer, as provided in the text, is: "I don't like to be formal, but the Company's lawyers insisted that I read this speech. That way I can't be mis-quoted with false accusations by the Union."

This need to read the speech "tells me something right away—a union means turmoil." To make it clear, Bassett states, "The Company will do everything legally [emphasis added, as this is a point in dispute] permissible to fight to keep the Union out." PDI will fight because it firmly believes that the Union has nothing positive to offer. "Instead, unions equal turmoil, disputes, bickering and strikes." By contrast, PDI offers a steady job, decent wages and benefits, and a true desire to treat each employee with respect and dignity. At PDI an employee is not just a number, but a person. "We are concerned and always want to hear your opinions."

"Remember that letter I wrote asking for your opinions??? Well I'm damn sorry that Bill [Bill Beaman, per Bassett at 21:3728] discouraged you from speaking out. But I'm glad I found out. Read the letter again—it's still on the bulletin board." [No copy of the referenced letter was offered in evidence.] After stating that PDI is not perfect but tries very hard, the text states that PDI has an employee handbook that guarantees fair treatment. "Here's the handbook [RX 40, per Bassett at 20:3582-3583]—you have all seen it before." The text inquires, "Did anyone not get one of these? Let me read you page 9." Bassett testified that he read the page 9 quote as provided in the script, (20:3581-3582): "If employees have concerns about work conditions or compensation, they are strongly encouraged to voice those [these in RX 40] concerns openly and directly to their supervisors!!" [A period, not exclamation points, in RX 40.] By the text, Bassett tells the group that the procedure works.

By the text, Bassett states that he had heard from some that PDI's commitment to positive relations was being violated. "This was confirmed by my investigation way before I even heard of union activity." Bassett then states that the employees saw the reversal of a few poor decisions of the warehouse manager. "And then you saw a very serious management change after I had a few more conversations with some of you." (Bassett fired Warehouse Manager Beaman on Friday, May 13, 1994. 20:3530; 22:3844.) This was done before the Union's petition, the text states. Bassett, by the text, asserts that PDI wants to continue the open and direct relationship it has with the employees, but that will not be so if the Union becomes the exclusive voice for the employees. Bassett then tells the employees to ask themselves what a clothing and textile union is doing at an auto parts company, and why is the Union so interested in getting their names and addresses. The answer, the text states, is that the Union wants "your money," and to get its hands on the employees' paychecks to keep the money rolling in to support the union officials.

What will the employees receive for the money they pay to the Union, the text asks. The answer: "The Company would have to sit down and bargain in good faith. That's it. That's all she wrote." And, as the text next advises, "There are no guarantees from the Union on wages and benefits. They could go up, stay the same or even go down." Ask the Union some questions, the text urges. The Union always makes all kinds of promises for more pay and benefits. Ask the Union to give the employees a 100% guarantee, in writing, that "if you pay the Union money, they will guarantee you more money from the Company. Ask them soon."

The Union cannot make this guarantee, the text advises, because the law states that the only thing a company has to do is to bargain in good faith. "The law states that a company is not required to make any concessions." PDI does not need a union. What PDI needs is the continued teamwork and a chance "to show you we can work together." Bassett, by the text, asks for the opportunity to show that the Union is not needed and that they all can work together. They are still a team; they respect each other; and the employees do not need to pay someone "to speak for you." Bassett, by the text, concludes by apologizing if he got "a little carried away," but the union matter is important to the employees and to PDI's future. [Bassett testified that "carried away" means he delivered, by script, the last few comments with "gusto." 23:4036–4038, 4075–4078.]

c. June 14, 1994

The text of this second speech (RX 33), because of more liberal spacing, appears to be a bit shorter than the first. Bassett, by the text, refers to a "Union" leaflet which, by script, he shows. (20:3599, Bassett.) Actually, the leaflet (GCX 20), on its face asserts that it is a statement by coworkers at the Miami facility and gives the reasons for their organizing a union. Photos of seven Miami employees are shown on the leaflet. The leaflet, which gives the date and time of the NLRB-conducted election, begins by suggesting that, together, the employees can win better working conditions: Less work, more pay, affordable health insurance, job security, seniority to be counted, fair treatment, and a pay raise. "With our Union, we will be able to make changes for the better at Parts Depot." (GCX 20.)

Early in the speech Bassett, by the text, comes to the first video: "Promises, Promises, Promises." As shown on the transcript (RX 23) of the videotape, the movie depicts a scene at a union hall with various employees talking among themselves and with a union organizer. At various points the narrator speaks to the reader [and presumably to the audience on the video] to give the true rule. The transcript, although using only the right half of each page for the scripted words (with the left half reserved for designating the speaker), is single spaced and runs for 15 pages.

The text of the speech opens reminding employees of the importance of the union election. By the text, Bassett states that he feels a moral obligation to present all the facts to the employees so that they can make the most intelligent decision when voting. "The first thing a union always does – is to try to get your support by making promises. This is their main organizing tactic. This Union is no different. [Show Union leaflet.] Here they go again, making promises of getting you more money and less hard work. [Point to top of leaflet.]" Remember, the text advises, that the Union is a salesperson, selling union membership and union dues in return for promises. The Union can guarantee you "absolutely nothing! The Union does not have a magic wand." The law does not work that way, the text states. Bassett, by the text, then states that PDI has located

a videotape "which contains an excellent explanation of the law. Much better than I can explain. We are going to take some time to review this video tape together." At this point, Bassett testified (20:3604–3605), the video was shown.

The video, by the transcript, opens at the union hall with the camcorder "eavesdropping" on the conversations. Employees are stating that once a union gets in the employees automatically get higher pay, better benefits, and job security. One employee expresses doubt. He is reassured that it is true, and that no one can be fired without the union's approval. Another employee says that with a union "WE tell THEM what stays and what goes, and how much overtime we'll work . . .and all that. When you got a union, you got REAL power." The narrator comes in at this point asking whether the foregoing sounds familiar. "One thing that you'll find in every union campaign . . . it's promises, promises and more promises." But there are no guarantees that a union can get employees anything, "as you will soon see." But that does not stop the organizer from making those promises. The scene then switches to the union organizer's arrival and to his speech.

After the organizer states that the labor movement in America is getting stronger every day, but more people are needed, the narrator comes in to give some history, stating that union membership peaked in 1945. Today, if government workers are not counted, unions represent only 12 percent of the workforce. "One report says that unions will represent less than Five Percent of the workforce by the year 2000." One reason for the decline is that employees have discovered that unions cannot do all that they claim. Another is that government has taken care of many of the problems that unions used to address. So, while unions once were important and needed, they are not anymore, and employees should not believe stories that union membership is growing.

The scene switches back to the organizer answering a question by stating that at the bargaining table "we tell them what we want. . . . Anything you decide you need. It's just that simple." Then the camera moves back to the narrator who states that things are not that simple. The narrator then says that, if a union wins, all the company has to do is to sit down and bargain. The National Labor Relations Act states that, while both sides are obligated to bargain in good faith, that obligation "does not compel either party to agree to a proposal." In other words, the narrator states, "as long as the company bargains in good faith, it doesn't have to agree to any union demand. And it doesn't even have to sign a contract with the union. Like I said, there are no guarantees."

An employee then asks the organizer whether employees can lose anything if the union is voted in. "Absolutely not! The law protects your right to belong to a union." The organizer adds that once the election is won, "we start bargaining from where you are now, and we bargain UP!" Addressing this matter, the narrator states that, once again, the organizer "is bending the truth." An employer may bargain "for even LESS than you have right now. The National Labor Relations Board has said:

> There is, of course, no obligation on the part of an employer to contract to continue all existing benefits, nor is it an unfair labor practice to offer reduced benefits.

Just remember, the narrator advises, negotiations can result in more, the same, or less. From this point until the concluding statement, the transcript covers whether union members really have control over whether a contract is signed, and covers such matters as dues, initiation fees, special assessment fees, salaries and expenses for union officials, and fees and expenses for retained professionals and for other matters like lawsuits. Ask questions, the narrator advises toward the end. The videotape concludes with the narrator, per the text, rolling his eyes and shaking his head when the organizer comes to the screen again, stating "after we sign that first contract—we'll have the company right in the palm of our hand. And you've got my promise on that."

Bassett then takes over, per the speech text, saying the video was an excellent and truthful presentation by an outside company. Bassett compares the union situation to buying a used car, where the union organizer is like a salesperson whose job is to polish up the used car and to tell the consumer how much he needs it. Bassett tells them to kick the tires and check under the hood before they buy the Union promises.

After advising employees that, if the Union gets in, PDI is required to bargain with the Union only, and would not be in a position to talk directly with employees about wages or benefits, Bassett, referring to the video, states that no law requires PDI to pay more than the federal minimum wage of $4.25. "The Company would have the right to bargain hard. The Company could bargain for a reduction in wages or benefits if economic factors indicate we should do so. As was covered in the tape, under collective bargaining, your wages and benefits can go down, go up or stay the same. In other words, the Union can do all the asking it wants. The only way a change can come about, however, is for the Company to agree." Employees should know what the Union is up to. "The hollow promises are nothing more than that."

Switching to a different topic, Bassett, per the text, states that an employee recently asked him whether the employees would get a pay raise if they voted No. Because it is an NLRB election period, the text advises, management is prohibited from making any kind of a promise. PDI is prohibited by law from saying anything that would even imply that conditions of employment would be changed if the Union is defeated. "Simply said, we cannot bribe you for your vote!" But once the election is over, and employees have voted No, PDI "will be free to continue to follow its policies without having to negotiate anything with the Union. We will be free to talk directly with you about these concerns. Remember too that never in the Company's history have we had a pay or a benefit cut."

By the text of the speech, Bassett ends by thanking the attendees for their attention, and telling them, "Remember, our doors are open; we have the 210 hotline [emphasis added because it an issue in case] if you have any questions you want to ask anonymously. I truly want to do everything I can to communicate openly with you about this important issue. Thank you."

Bassett's telling employees to remember the hotline refers to an undated memo (GCX 18) from Bassett to all employees advising them that "now" they can dial the "210 confidential hotline from their home or from any outside telephone. They are told to dial 633-6900, to ignore the recording, and to press * [star] 210. They then would hear Bassett's recording. The undated memo was posted, Bassett testified, about late May 1994. (7:1051–1052; 22:3895–3896.)

Bassett's efforts in this June 14 speech to neutralize the supposed "hollow promises" of the Union is an ironic use against the Union of the theme of union songwriter Joe Hill's "pie in the sky" phrase in the refrain of Hill's 1911 song, *The Preacher and the Slave.* [7]

d. June 22, 1994

During this third speech, the text (RX 34) calls for Bassett to pass out two items. The first is a one-page document having the appearance of a certificate, with computer-generated borders, titled, "Union Guarantees" and having a signature line for Monica Russo, Union Organizer. A preamble advises employees to protect themselves against deceptive union promises by getting the union official to sign the document. The document contains seven numbered guarantees, from a pay raise of so much (amount to be filled in) per hour in the very first contract, to more paid holidays and more paid vacation days in the first contract (numbers to be filled in), to matters about dues and the Union's constitution, that stewards and union officials "will not receive priority over you if layoffs are necessary at P.D.I," to a promise of returning to their jobs after a strike even if permanently replaced (number 5), and (number 8) a guarantee that the Union "will pay for the support of your family and all of their expenses if you are thrown out of work because of union strikes or other activities." If the organizer fails to sign, then the text tells employees that they should, in large, bold capitals, Vote No. The reverse side has the document in Spanish. As Bassett recalls, he distributed copies of the Union Guarantees form to attendees. (20:3621.)

The second document, which Bassett also distributed (20:3621, 3623), is a one-page photo of a portion of the statute, including, with pointer and note that this is the law, Section 8(d) of the Act, with the pointer on the clause that a party is not required to make a concession.

A short distance into the speech, the text calls for the video to be played. This is the second video, "Let's Make A Deal." Bassett testified that he played it at the point indicated in the speech script. (20:3620.) The video's topic is collective bargaining, and the transcript (RX 24) covers a scene at a bargaining table with the narrator commenting.

Launching into this third speech, Bassett, per the text, again states that he has a moral responsibility to lay out the facts. He also repeats that "The Company is opposed to the Union. There should be absolutely no question about that. We are convinced that the facts that we know about unions conclusively proves that a union at Parts Depot would be contraproductive to all of us." Pointing to an easel (20:3617), or flip chart as denoted in the speech, Bassett stated that the topic for the day was collective bargaining. Union promises, the text states, do not produce more money, vacations, and such as if by there is a magic wand to be waved. Advising that PDI had obtained another videotape which explains collective bargaining, Bassett also disclosed that, in scripted answer to a question [a question apparently posed in advance of the meeting], PDI did not produce the tapes. "We found a company in Atlanta that did this for educational purposes. The tape is an honest factual program. [Play the tape.]"

The narrator begins by explaining that both sides take to the bargaining table a list of things each wants. What happens? The truth is, the narrator states, "nobody knows what would happen. But let's take a look at how the union organizer WANTS you to think bargaining works." The scene that follows depicts the union representative demanding three extra holidays, an extra week of vacation, and a 7 percent pay increase. The employer's representative pleads that costs have gone up and competition is hurting the company. That's the company's problem is, in essence, the union's response. After quoting the law that no concession is required, the narrator then switches to what he calls a more "realistic" version of what can happen. The union representative starts with a union recognition clause, a union security clause, and a superseniority clause. The narrator then describes those clauses. After perhaps months of bargaining the parties reach the money issues. To the union's proposal for a 7 percent pay increase the company states that it cannot do so because of a battle with the competition. When the union says the employer cannot do that, the employer says it has the legal right. On holidays and vacations the company says that it has made a survey and found that it is giving more than the competition. Thus, it proposes a reduction in those items.

The narrator then explains that the law permits the company to propose a reduction. Indeed, the narrator states that "in two out of every three union contracts, the employees either stayed where they were or ended up with less. But why does the union let it happen? See for yourself." At this point the union begins dealing. "We want a dues checkoff clause, union security and superseniority . . . and if you give them to us, we won't ask for any wage increase, and we'll give you back your two holidays and cut back on the vacation plan." "Let's make a deal," the union representative pleads. The company representative says, "O.K. You got a deal." They shake hands as the scene ends.

Summing up, the narrator reminds that in bargaining employees can end up with more, the same, or less. Then, incorrectly attributing a quote to the National Labor Relations Board (as if it were the Board's language rather than a quotation from an employer's statement), the narrator states that the National Labor Relations Board has said very clearly that: "collective bargaining is potentially hazardous for employees, and that as a result of such negotiations, employees might possibly wind up with less . . . after unionization than before." In his final comments, the narrator lays the transition to the next video topic by a brief reference to strikes, and by asking employees to think about what happens when the parties are not able to reach an agreement for a contract. Like everything else with a union,

[7] You will eat, bye and bye, In that glorious land above the sky; Work and pray, live on hay, You'll get pie in the sky when you die.

Gibbs S. Smith, Joe Hill 20–21, 239 (1969, 1984 Peregrine Smith Books.)

"what you don't know can very definitely hurt you." After a scripted pause, the narrator concludes by saying, "The bottom line here is having a union in your life is a very serious thing. It is definitely NOT a game."

Bassett then resumes his text by repeating the theme that all collective bargaining guarantees employees is that PDI must "meet and confer in good faith." "And we would do that," Bassett assured, by the text. "That is what you would pay the Union to do for you. They cannot guarantee you anything." The script then calls for Bassett to show the Union Guarantees, which he distributes. The text calls for him to ask whether anyone has gotten one of these signed by Monica, the union organizer. "[Pause} We all know why, don't we.?" Next, "Here is a copy of the law that was referred to in the tape. [Hand out the copy of the law.] Do you get the point? Bringing the Union in here means politics; it means hard core negotiations; it means hard bargaining; it means a lot of accusations and maybe a lot of arguing at the bargaining table."

"Maybe it means the Union takes a strike vote to try to put pressure on the Company to cave in. This could lead to a contract. This could also lead to a strike. That could mean no paychecks, no unemployment, and possibly being permanently replaced by other workers. Believe me—this can be very unpleasant. Who needs it? Not me, and not you. We would all suffer. Only the Union would make out because you would still have to pay them your dues! Thanks."

e. June 29, 1994

In this fourth speech Bassett, per the text (RX 35), repeats his view that it is his "moral duty to give you all of the facts so that you can make an informed decision. Today we are focusing on job security. [Point to 'job security' written on easel]." This quickly leads to statements about competition, which must be out hustled, and the need to keep customers by quality service, timely delivery, and teamwork. By the script, Bassett is to point to these terms on the easel. He testified that he used the pointer and easel for this speech. (21:3762.) He also testified that he referred to a news article about a strike by the Union (21:3759-3761) and showed the third videotape, "Job Security Union Style." (17:2662–2663, 2697; 21:3759.) The transcript (RX 25) for the third videotape is a lengthy 18 pages, with the comments, all by the narrator, single spaced on the right half of the pages. The main topic of the video is strikes in relation to job security.

After pointing to the easel and the topics of competition, quality service, timely delivery, and teamwork as the "secret to our success," Bassett states that the question for the election is, "What will the Union do to help us compete? I submit to you that a union could not and would not help our situation—but they could hurt it. Unions don't make jobs more secure. In fact, the opposite could be true. Unions can make jobs insecure by insisting on practices and engaging in actions which affect the quality of our service." Bassett then, by the text, states that PDI's business depends on customers, and that a union cannot get customers to place orders. Customers decide what job security there is, and customers are interested in a "dependable supplier." Launching into the subject of strikes, Bassett, by the text, states that customers are not interested in having their warehouses interrupted or "short circuited by strikes." He then informs the employees that PDI has found another videotape "on precisely this issue that was produced by the company in Atlanta. This is an educational tape that covers the facts and I want to show this to you. [Roll tape 'job security' . . . union style]."

As reflected by the transcript (RX 25), the video opens with "sound of footsteps on concrete floor. Shot of slightly lit narrator in dark room. Can't see where he is." The narrator begins by saying that it is only natural for everyone to want good pay, safe working conditions, and job security, with job security probably being the single most important item. With the economy changing almost overnight, the number of places like this (the lights come on to show a deserted building) is increasing. The narrator then states that until 2 years ago this plant was operating at "full steam," employing about 150 persons, but today, "as you can see . . . it's empty." "The sad fact is that the days of lifetime job security are over." From there the narrator proceeds to list the many economic pressures that are squeezing employers, and briefly discusses the items companies need to survive: quality, speed, value, and flexibility. The "bottom line" is to have these qualities and to price the product or service so that "customers will continue buying from you," and to accomplish this requires teamwork. Only those companies that can compete will be able to survive, prosper, "and provide job security to its employees."

And where do unions fit into this "new philosophy of cooperation between employees and management? The fact is, they don't." Unions, the narrator goes on, cannot provide job security. The narrator then refers to the steel industry in the United States, with "giant steel mills" closing, and the rubber industry, where today "not one passenger tire is made in Akron, home of the United Rubberworkers union." And "everyone knows the plight of the American Auto Industry, suffering from competitive shock." Despite representation by the United Autoworkers Union, "hundreds of thousands of union members are losing their jobs as the American carmakers continue to shut down their money-losing operations." Unions, the narrator states, did not help when the companies tried to become more efficient and more competitive. Unions, the text continues, have been very slow to change from an "US" versus "THEM" mentality. Constant friction, a lack of cooperation, and on many occasions, strikes and violence. "Unfortunately, not much has changed over the years. Today, the union strike is still with us." The narrator continues and states that unions oppose "any team concept programs," and resist including any references to "Team" or "Teamwork" in labor contracts.

After stating that unions can jeopardize job security by restrictive work rules and opposing changes that would make a company more efficient. At "this plant," the narrator continues, after the employees voted the union in, the parties bargained for almost 2 years. The company needed concessions on contract changes to stay competitive, but the union refused. "When the union threatened to strike, the company moved the operations to another plant, and all the employees at THIS plant had to find work somewhere else. THAT'S what can happen when a union gets in." At this point the narrator begins a series of statements about strikes, pointing out that the company stops

issuing paychecks during a strike. Strikers undergo financial hardship, and bank loans are hard to obtain. Aside from the financial problems caused by strikes, there are emotional scars, too. Replacement workers can be hired, and that causes more anger. Emotions run high, friends become enemies, and families split apart. "Homes and cars and personal possessions can be lost . . . and even more tragically, sometimes lives are lost." [Bassett admits that there was an image of fighting on the picket line and an image of a gun being cocked and displayed, and that such probably was in this section of the video. 23:3966.]

The narrator continues with a question about what happens when the strike ends and the picket line comes down. "Well, no one really knows for sure, but one thing is for certain: the company has the right to keep operating with the replacement workers it hired during the economic strike . . . and the strikers don't have to be returned to their jobs. That's right. The strikers' names will be put on a list, and they will be returned to work as jobs come open that they are qualified for. But that could be weeks, months, even years . . . and sometimes never." Some very visible strikes have proved the point in the last few years, the narrator states, adding that thousands of unreported strikes make it clear that strikes are "risky." Moreover, the narrator continues, the National Labor Relations Board has verified this in a recent case by stating: "An employer may permanently replace economic strikers."

The narrator then summarizes the points he has covered, adding a statement that "if there's no union, there's no union strike." About the only people who do not get hurt in a strike, the narrator continues, are the union officials. "They continue to get paid, and they don't worry about losing their jobs" regardless of the outcome. "The bottom line is that strikes happen, and they happen a lot. They happen when and where you least expect them, and they happen to people who say 'it can't happen here'." When that happens, the narrator remarks, the results can be very painful. "Do you remember the title of this program?" the narrator asks, in concluding. "It's called 'Job Security . . . Union Style.' Hopefully, by now, you've seen that there really is no such thing."

"That was excellent," Bassett remarks, in resuming his speech, according to the text. Bassett observes that the video made two significant points. The first is that a union would not help PDI remain competitive because the "Us" versus "Them" atmosphere unions are interested in creating sends the wrong message to PDI's customers. The second point is strikes. "As it was pointed out in the tape, the real threat to our job security comes from a strike-happy union that has made many promises it knows it cannot keep." Strikes not only hurt employees and perhaps the company, but they also "can drive away our customers."

Bassett then shows a newspaper account (RX 35 at 15) of a strike by the Amalgamated. After the strike the Union accepted the company's earlier proposal. "Think about it," Bassett states, "The Clothing & Textile Union let the workers go out on strike for 54 days for nothing! And what happened next is what we just saw on the tape. When the 700 workers tried to go back to work, they found out that only about 20 of them had jobs." Bassett, by the text, and his testimony (21:3761, 3765-3767), read from the article, "The remaining workers have been put on a recall list and will be called back as a ["the" in the article] situation warrants." Returning to his speech, Bassett then states, "Folks, this is [these are] the facts. Here is living proof that in April 1994 almost 700 Clothing & Textile Union workers, who had put their faith and trust in the Union, went on strike and were permanently replaced. This is one specific example of what can happen with unions."

Bassett then refers to the problems of Eastern Airlines, concluding that reference with, "We all know people in this community who were devastated." "No one can predict what would happen here if the Union came in. What I am saying is we cannot make the mistake of thinking it can't happen here. A strike can happen anywhere any time a company and a union do not agree on the terms of a contract. This is something I urge you to carefully think about before you exercise your right to vote next week. Thank you for your attention and support. [Hand out news article]." As Bassett ended and copies of the news article were being distributed (21:3768), an employee asked a question about striker replacements. (21:3764, 3768.) I address that exchange later.

f. July 6, 1994

For his last preelection speech ("25th Hour," RX 36), Bassett refers back to the events of May and contrasts the management styles of Bill Beaman, the fired warehouse manager, and his successor, Leo Belaunzaran. When Bassett concludes, he turns the meeting over to Belaunzaran who delivers a speech (RX 37) of his own.

Bassett testified that he showed the fourth videotape (RX 18, "25th Hour") at the beginning of this meeting. (21:3773.) It is a videotape containing, as shown by the transcript (RX 26), statements by a narrator with his statements interspersed with testimonials by Coca Cola employees who assertedly had experienced a strike at a Coca Cola plant. The narrator begins by reminding viewers that very soon they will vote. To help make that important decision, the narrator reports, the viewers will see and hear from one former union organizer and testimonials from employees. The statements and testimonials begin with the topics of dues, assessments, and fines. When the organizer, "Barbara," is about to speak, Bassett pauses the videotape and tells (21:3774-3775) his audience that Barbara was a union organizer like Monica [Russo] and that "She knows the truth and has decided to tell the real truth. Listen to her throughout this tape." (RX 36 at 2.) When the first worker begins the employee testimonials, Bassett again (21:3774) pauses the videotape and tells his audience, "These are real workers, not actors. They voted for the union. They will be telling you about their disappointments and the lies the union told them. Listen carefully." (RX 36 at 2.)

After the topics of dues and such, the narrator turns to union promises and collective bargaining, reminding viewers that "All the union wins in the election is the right to bargain. And bargaining is like a game of 'Let's Make A Deal'. Workers COULD end up with more, they could end up with just what they started with, or they could end up with LESS." Moments later the testimonials begin describing the promises assertedly made by the union, concluding with a statement by "Dave"

that, "When it comes down to it the raises weren't there. I think they actually cheated me in the long run." At that point the narrator again (as in second video, as reflected at RX 24 at 9) incorrectly attributes a quote to the National Labor Relations Board as stating (rather than showing the Board as quoting from an employer's statement) that "collective bargaining is potentially hazardous for employees and … as a result of such negotiations employees might possibly wind up with less … after unionization than before." (RX 26 at 7.)

From following statements about checkoff and superseniority clauses the narrator leads into company relocations by stating that a company can and must do whatever is needed to survive. Thus, "Court rulings" have said that the presence of a union does not prohibit an employer "from moving its plant should economic conditions so dictate." [The transcript shows the name of "Oxford Pickles." The quote is an accurate reflection of the Board's statement in *Oxford Pickles*, 190 NLRB 109 at 109 ((1971): "Nor does the presence of a union prohibit an employer from moving its plant should economic conditions so dictate."] The narrator then states that a union cannot guarantee job security, which comes only from keeping "your company" financially strong and from timely delivery of products and services at a competitive price. Unions do not seem to understand this, and time and again unions have "damaged their members' companies." Indeed, "Far from offering job security, the unions have jeopardized the very thing they say they want to protect."

The narrator then turns to strikes, stating that unions do strike and they strike often and "Don't think it can't happen to you." Financial hardships of a strike are described, with the narrator stating, "So, there's going to be financial hardship. Serious hardship." From there the narrator turns to permanent replacements, "something the union doesn't often talk about. But we're sure the thousands and thousands of union workers who have lost their jobs to replacement workers would have something to say." After a quote from a Riverside Hospital picketer about being replaced, the narrator continues with the theme that (RX 26 at 12): "Strikers get replaced very often and statistics show it is happening more and more. And those replacements have the legal right to keep that job for as long as they want. The striker does get put on a preferential hiring list, but he doesn't get his job back until the replacement quits or is terminated."

From the "financial hardship" of strikes the narrator then moves to the "possibility of violence," with the video then showing, as reflected in the transcript, a lengthy statement by Barbara, the former organizer, about friends shunning them, homes being spray painted with obscenities, tires flattened, acid thrown on your car, your windshield broken, "and I've seen all of this," even "more than once." Barbara asks viewers whether they, as strikers, will be able to, among other items, "follow peoples' children on school buses and call them up and tell them you know where their children are? Can you throw paint on their garage doors? Can you, and I've seen this happen, can you strangle their cats or dogs? Can you leave threatening notes? Can you make phone calls all night long, keep people from sleeping? Are you willing to lower yourself to that level? I'm not saying every union member does, but some do, and it's frightening what a mind set like that can do to a large number of people." (RX 26 at 12–13.) The narrator follows up by stating that, while no one wants a strike, "the only sure way to avoid a union strike is to avoid the union."

The narrator describes union thinking as unchanged from the 1800s, including damaging strikes, and states that such methods are no longer successful, and "the massive decline in union membership proves it." After some brief testimonials about distorted facts and employees losing, the narrator approaches the video's close with a paragraph referring to the "misery" unions have brought to many of their members, the "harsh rules and regulations," references to dues, strikes, and the battle lines that put union bureaucracy between employees and their company. He concludes by urging the viewers not to put themselves through the tough lessons "these people learned the hard way." Think about the facts. If they do, they will realize, "like 8 out of ten workers in America, that you will be better off by voting NO and staying union-free."

Bassett then resumes his speech, and tells his audience that, rather than picking an education theme as he has done over the last few weeks, "I'd like to talk personally to you." Bassett describes his personal employment history, but before doing so he tells the group that, "Even though my message today is in the form of a speech, I would like for you to consider this a personal conversation and an opportunity to get to know me a little better." From his personal employment history, and company picnics, Bassett arrives at the topic of the warehouse manager. After Bassett's arrival at PDI, all managers and supervisors were promoted from within. "All except one who was brought in from Tampa. And you know who that was." With that obvious reference to Bill Beaman, Bassett then states that, even though "that situation is no longer here, I seem to be paying the personal price of when it was here. This outside union campaign." Stating that he regards this "problem" in a personal way, because he selected the management, Bassett expresses regret at going against his own vow by bringing in someone from outside to be the warehouse manager. "I think I acted late" in correcting the management situation. Bassett states that he learned that employees were "spoken to" or sometimes "disciplined" by the warehouse manager it they talked to Bassett. "What was he afraid of???"

Bassett states that he learned that "we had a manager just like you might expect to find in a union warehouse where there was no representation direct to the top management." And, "PDI is opposed to the union, but we had a management style in the warehouse just like we already had a union in the warehouse. So, you already know what management could be like with a union/contract mentality. Because you had one! Many of you thought you were signing a petition just to get a change in one manager. A manager who was completely different from the style of Leo. A manager you would expect to find in a union warehouse. Leo has shown the way of managing without a union. Bill showed us the way of managing with a union and a union steward. The only difference with [the] former warehouse management is you did not have to pay dues to be managed in that style." From there Bassett, leading up to turning the meeting over to Warehouse Manager Leo Belaunzaran, asserts that he likes Belaunzaran's style much better. In turning

the meeting over to Belaunzaran, Bassett states, "Let's hear about Leo and his vision of the future here at PDI without a union."

Respecting Belaunzaran's speech (RX 37), it is sufficient to note that Belaunzaran, by the text, describes his employment background, and how things changed for the better on May 13 [the date Bassett fired Beaman]. Belaunzaran goes on to say that his style is to operate with trust, dignity, and working together as a team. "If you give me a chance, I will prove to you that we will continue to operate together in an environment of trust and respect." Turning to the election, Belaunzaran states that no one will be fired for supporting the Union, but that a NO vote is needed, and by voting no union "you are voting for me. If I and the company do not live up to your expectations, you can go back to the union. But, if you vote the union in, it will cause us the problems we have heard and read about over the past several weeks." Belaunzaran concludes by again urging employees to vote NO. The complaint does not attack any part of Belaunzaran's speech.

During the campaign Bassett also mailed, distributed, or posted various letters or memos. (21:3791.) One of these documents was a (Tuesday) July 5, 1994 letter mailed to employees at their homes. (21:3801–3802, 3812–3813; 22:3840.) The three-page letter (RX 45, English; RX 46, Spanish) reiterates several points previously made and again urges employees to vote NO. The letter's specific relevance in relation to the speeches, as described by PDI's counsel (21:3796), is to show context by reason of, for example, the following paragraph on the second page: "As I read in our 'VIDEO TAPE' meetings, the thing that bothers me is: the only way a union can try to enforce its demand is to recommend a strike. We don't say that a strike always occurs when dealing with a union. We do say that it is important for you to know that should one occur, under the law, the Company is not required to pay wages to anyone on strike for economic reasons. And the company is not required to stop operating. Unions never tell you that if you are an economic striker you can be permanently replaced. The company must continue to operate."

At trial the General Counsel and the Union objection to this letter, and to two other items of campaign literature. The primary objection is that the letter was merely an attempt to lessen the sting of the remarks of Bassett and the narrator and therefore is not relevant because not presented to the employees during any of the speeches. (21:3807–3808.) Although I overruled that objection, plus others, and received the documents in evidence (21:3813), it appears that there is much force to the General Counsel's argument on the Government's primary objection. Thus, I would not find that the statement, "We don't say that a strike always occurs when dealing with a union," neutralizes any unlawful statement or statements in the speeches and videos. First, the sentence would be reached and read only by someone interested enough to hear even more about the union election. As of July 6 or 7 (about the time employees presumably would be receiving the letter of July 5), after just having attended Bassett's fifth speech, and seen the fourth video, employees might well be so saturated that they would have no interest in reading the three-page letter or the assertedly enclosed list of important questions. (RX 45 has no list of questions attached.)

Second, and the flip side of the first point, the speeches and videos were presented "live" at captive audience sessions. Moreover, as the speeches were read, but in the fashion of using a teleprompter, and as the narrator's remarks were delivered in a television format, the employees merely had to listen, not read the fine print. Accordingly, I find that the July 5 letter (RX 45) is not relevant in determining the lawfulness of remarks made during the speeches.

g. Discussion

(1) No deviation

Of the several witnesses I named earlier, only two appear to be the major witnesses: Demosthene for the General Counsel, and Bassett for PDI. Some of the others gave important supporting testimony, but they either attended fewer meetings, were uncertain in their descriptions, or their descriptions were the distorted result of merging bits and pieces from the different meetings, while adding their own confused perceptions of the statements made.

As for the procedure Bassett followed in delivering his speeches, I credit Bassett, and his supporting witnesses, that he gave the text of his speeches, as written in the exhibits, without deviation. (I address later the issue of whether Bassett made additional remarks, particularly in answer to questions, after he had completed his readings.) I find no merit to testimony about deviation in the form of, for example, Bassett's omitting the word "legally." (See the first speech, on May 17, where the text calls for Bassett to say, "The company will do everything legally [emphasis added] permissible to fight to keep the Union out.") In addition to the credited testimony of Sara Mitchell (19:3147) and Barbara Shaw (19:3338, 3356), that Bassett used the term, I note that the parties stipulated that Osberto Jerez (a Government witness subpenaed by PDI to testify during PDI's case in chief) would have testified (in accordance with a section in a pretrial affidavit, RX 42; 13:2103; 21:3706) that, during "the" meeting, Bassett "told us that he would do everything he could do legally [emphasis added] to keep the union out of the company." (21:3706, 3708.)

Although the stipulation failed to specify the meeting, the one paragraph section (RX 42) from the affidavit gives sufficient clues for me to find, as I do, that Jerez was describing the first speech (RX 32), that of May 17, 1994. Thus, that Bassett said "that the union can't guarantee our wages" (RX 42) is almost identical to Bassett's May 17 statement that: "There are no guarantees from the Union [although I capitalize "Union" here, the text of the exhibit has all words in capitals] on wages and benefits. They could go up, stay the same, or even go down." (RX 32 at 5.) Also, that during "this meeting" Bassett "was blaming the company's problems on Bill Beaman" (RX 42) is consistent with Bassett's statements on May 17 that he was sorry "Bill" had "discouraged you from speaking out," (RX 32 at 3), and (RX 32 at 4) that he, Bassett, had reversed some poor decisions of the warehouse manager and, after an investigation, made a management change. Although Bassett's references to Beaman were more specific and detailed in the

fifth speech on July 6 (RX 36), it seems clear, and I find, that Jerez was describing the speech of May 17.

Turn now to the mass of the speeches and the videotapes. It is important to consider, as earlier noted, that no witness made any contemporary notes of the speeches. Demosthene concedes he made none (4:637), but he nevertheless boldly proclaims (4:637): "I remember everything that was said." Even so, Demosthene admits that his memory was better when he gave his pretrial affidavit in August 1994 than it was at the trial. (4:591.) Yet even in his pretrial affidavit of August 29, 1994 (GCX 16), Demosthene, who there describes Bassett as speaking without benefit of any prepared text and mostly addressing Bill Beaman and related matters, makes no mention of Bassett's announcement of the purpose for his calling the meeting (to discuss the Union's having filed a representation petition) or most of the other topics covered in the speech. Demosthene does no better in his description at trial.

Demosthene's limited and faulty recall is understandable. As most anyone would have been, Demosthene was adversely impacted by two factors. First, over 3 months had elapsed since Bassett's May 17 speech and Demosthene's pretrial affidavit of August 29. Without benefit of any contemporaneous notes, he was trying to recall remarks delivered several months earlier. Second, the time-lapse problem was compounded by the fact that, since May 17, there had been four additional speeches, plus four videos, all dealing with the Union. [Demosthene recalls attending only four speeches, but he is unsure of how many because it has been a "long time ago." (4:608, 660.) In fact, Demosthene is confused, as most anyone would be, about the dates, placing the first two speeches in May, the third on June 13 or 14, the fourth on June 20 (4:668, 689) or June 27 (4:660, 687–690), with a videotape shown either at the third meeting (4:661) or (4:608; GCX 16 at 5) about June 20. Finally, Demosthene recalls seeing only one video dealing with the Union. 4:658, 661–662, 668.]

Demosthene appeared to testify with sincerity. His problem is that his memory suffers from having been shell shocked by the carpet bombing which PDI dropped on the employees in the form of the videos and Bassett's speeches. From that massive bombardment, Demosthene's damaged memory formed incorrect recollections by merging parts of statements made with the fear and shock images that the carpet bombing (even if composed of lawful statements when considered in isolation) was designed to create. I discuss examples of this shortly when I address the allegations of threats by Bassett.

Respecting Bassett's speech of May 17, Demosthene testified that Terry Darling sat next to him. (4:611–612.) Presumably Darling also attended Bassett's second speech of June 14, for Darling is shown as being scheduled, at least, to attend that meeting along with Demosthene and others. (RX 33 at 12.) As the documents reflect, Darling also was scheduled to attend the same session as Demosthene of the fourth speech of June 29. (RX 35 at 10.) [No schedule list is in evidence for the third speech of June 22.] Similarly, for Bassett's fifth, and last, preelection speech of July 6, Darling is again shown as scheduled to attend the same session as Demosthene. (RX 36 at 13.) On cross examination, Darling testified that he attended an unspecified number of the management meetings. (17:2621.) Yet, as the General Counsel's witness, Darling was not asked about the meetings, and therefore does not corroborate any of the testimony of Demosthene concerning any of the speeches.

(2) Questions and answers

Respecting the first meeting, that of May 17, Demosthene asserts that, at the meeting, Bassett began speaking about Bill Beaman, saying that he was sorry, that he had not known that Beaman was the bad guy and had closed the door between management and employees. That is why Beaman had been fired. But now the door is open, and if anyone has a problem he can go to either (Operations Manager) Jack Jenkins or to Bassett. Bassett asked the employees to give him a chance to review the personnel files and ascertain which employees Beaman should have given pay raises and benefits to and then he could negotiate with the employees. (3:412–413; 4:554.) Demosthene concedes that nothing was said afterwards about any pay raises from any such review of the files. (4:658.)

Ronaldo Hernandez testified similarly (although placing the meeting in late May, and asserting that a video meeting had preceded it), including a reference by Bassett that there would be "open doors." Hernandez added that Bassett said there would be an evaluation of personnel and a raise according to the evaluation. (10:1578–1579; 11:1716.) Cross examination of Hernandez clarified that the mention of evaluations and pay raises came at the "last meeting," which Hernandez placed in April. (11:1715, 1717–1718.) Respecting the evaluations and pay raises, Hernandez, I find, his memory confused, imported images from a post-election meeting in which Bassett explained the evaluation process and the pay raises—the subject of a separate complaint allegation which I discuss later.

As Bassett credibly explains, apparently following his reading about the "open door" policy from page 9 of the employee handbook (RX 40), an "animated" discussion broke out among the employees, and he was asked something about sick days not being properly recorded in the personnel files. Bassett replied that this was not the occasion to address personal matters, that the open door policy was available for that, and he reread the provision from page 9 of the handbook. Bassett recalls no reference to pay raises. (20:3578–3584; 22:3901–3903; 23:4029, 4032–4034.)

Although I credit Bassett, and not the inconsistent portions of the employee testimony, I find it plausible that, as Demosthene describes, with Beaman having been fired, Bassett told the employees that, under the open door policy as provided in the employee handbook, employees with problems could come see either Jenkins or himself.

Although the page 9 provision is not a clear declaration the division president's door is open to employees, [8] as the warehouse manager had just been fired, Bassett's response to the employees, of the availability of either Jenkins or himself, was not inconsistent with the handbook's policy—a policy available to all employees, not just the warehouse employees. Accordingly, I shall dismiss complaint paragraphs 5(d) and 5(e) which allege unlawful solicitation.

[8] Perhaps a clearer statement would help avoid comparisons with the Scott Adams' witticism, "Great Lies of Management: 2. 'I have an open-door policy.'" S. Adams, *The Dilbert Principle* 51 (1996.)

4. The employee hotline

Two allegations, alleging solicitation of grievances (complaint paragraphs 5g and 5h), pertain to an employee hotline which Bassett established about late May. Recall that, in his speech of June 14, Bassett stated, "Remember, our doors are open; we have the 210 hotline if you have any questions you want to ask anonymously. I truly want to do everything I can to communicate openly with you about this important issue." (RX 33 at 10.) Bassett testified that the purpose of the hotline was particularly for employees to ask questions relating to the union issues. (23:4031.) Specifically, it was for employees who wanted to remain anonymous respecting their questions. The questions could be called in and recorded on a confidential voice mail, and Bassett could later post answers. (20:3609.)

The General Counsel and the Union cite cases involving clear, even express, solicitations of grievances. A case cited by the Union even involves a hotline. However, the hotline was linked to the solicitation and correction of grievances. *DTR Industries,* 311 National Labor Relations Board 833, 834 (1993), enf. denied 39 F.3d 106, (6th Cir. 1994.) [The Board's motion for clarification also was denied. See 317 NLRB 825 (1995.)] Such cases are inapposite. The closest point to a solicitation of grievances is the fact that Bassett's voice recorded message stated, after identifying Bassett, as follows (7:1053, Casco): "This is a confidential hotline. Any problems or questions you have just submit it after this recording and I'll answer you at the bulletin board with no names and confidentially."

Although Bassett used of the word "problems" on the recording (a term which could suggest grievances), the overall context shows that the hotline was limited to questions, particularly questions about the Union. Thus, the recording also refers to questions, and Bassett states that he will post his answers on the bulletin board—an unlikely spot for personal matters. And there is no evidence that the procedure was used for general grievances, much less the correction of such. In his speech on June 14, Bassett mentioned only "questions," and he said nothing about "problems."

Agreeing with PDI's argument (Brief at 32), that the hotline was nothing more than a "Section 8(c) communications tool for PDI to inform its employees about the Union and union campaign issue," I find it immaterial that here was no preexisting hotline. Finding no merit to the allegations, I shall dismiss complaint paragraphs 5(g) and (h.)

5. Opportunity to bid for supervisory position

Complaint paragraph 5(f) alleges that, about May 20, 1994, PDI offered employees "an opportunity to bid for a supervisory position in order to discourage employees" from supporting the Union. Complaint paragraph 12 also alleges it as a violation of Section 8(a)(3) of the Act. PDI denies. In support of these allegations, the General Counsel relies on evidence showing that, without precedent of posting supervisory positions (much less those for management), PDI posted, for bidding, the vacant position of warehouse manager. Leo Belaunzaran bid, was interviewed by management (including Bassett), selected, and promoted from his position of receiving clerk. [Belaunzaran had many years of management experience at his previous employer.]

The General Counsel argues (Brief at 116) that the posting of the warehouse manager's vacant position was an unlawful offer of benefit of promotional opportunities. In testifying, Bassett did not explain this departure from past practice. On brief PDI fights a different battle by arguing that promotions are lawful when pursuant to an established practice. (Brief at 81.) The issue here is the new practice of posting.

In his fifth and last preelection speech, on July 6, Bassett describes how, during his tenure as division president, all managers and supervisors had been promoted locally, and that he had made a mistake by bringing in Bill Beaman from Tampa to be the warehouse manager. Bassett said, however, that he had returned to his "original vow" and brought in someone "who grew from inside the company." And, "I think it is now time for me to step aside and let us all listen to Leo, our new warehouse manager. Let's hear about Leo and his vision of the future here at PDI without a union. Leo—it's your warehouse and your meeting."

Treating Bassett's July 6 remarks as admissions of fact, an inference is raised that Bassett's May 1995 motive for posting the vacant warehouse manager's position was to help dissuade employees from supporting the Union. [Although a party may not satisfy an affirmative burden by relying on statements in one of the speeches to prove an independent fact from hearsay, admissions of a party are not so restricted.] Thus, employees would see that they did not need the Union to have the opportunity to bid on this managerial position, and perhaps on future supervisor and managerial positions. The inference stands unrebutted. I therefore find merit to complaint paragraphs 5(f) and 12.

6. Changed attendance policy

Complaint paragraph 11 alleges that, about May 16, 1994, Bassett "changed the day off policy at Respondent's Miami warehouse in order to discourage employees from joining, supporting or assisting the Union." Respondent denies. Although paragraph 11 is alleged to be a violation of Section 8(a)(3) of the Act, I treat it here because it is closely related to the question and answers at the first speech on May 17.

As Bassett credibly explains, Mondays and the 26th of each month are very heavy days for the warehouse. (22:3835.) Beaman had posted a memo (no copy in evidence) urging employees not to miss work on those days. (22:3835; 23:4045.) [I do not credit Ronald Casco's version, including his recollection that the memo mandated attendance on such days and prohibited employees from calling in or scheduling appointments on them. 6:973–976; 7:1047–1050; 8:1275–1276.] Employee comments about sick days, voiced at the May 17 speech, prompted Bassett the following day to post, alongside Beaman's memo, a copy of the Employee Handbook's policy on attendance, reading as follows (RX 40 at 41):

> To maintain a safe and productive work environment, the Company expects employees to be reliable and to be punctual in reporting for scheduled work. Absenteeism and tardiness place a burden on other employees and on the Company. In the rare instance when an employee cannot avoid being late to work or is unable to work as sched-

> uled, he or she should notify the supervisor as soon as possible in advance of the anticipated tardiness or absence.
>
> Poor attendance and excessive tardiness are disruptive. Either may lead to disciplinary action, up to and including termination of employment.

After that May 18, apparently soon afterwards, Bassett observed that someone had marked a red "X" across Beaman's memo. Bassett removed the defaced Beaman memo. (22:3835–3829; 23:4047.)

As Bassett's posting action merely responded to employee comments about sick days by posting the existing attendance policy alongside Beaman's memo, ostensibly for the purpose of providing the full company policy statement, I find no merit to the Government's allegation of unlawful motivation. Accordingly, I shall dismiss complaint paragraph 11.

7. Alleged threats in Bassett's speeches

a. Introduction

Having found that Bassett did not deviate from the prepared text of his speeches, I turn now to the question of whether, in the texts, or during questions and answers which occurred at two speeches [the first speech of May 17 and the fourth speech of June 29), Bassett made certain alleged threats. The dates alleged in the complaint are of little value. I granted the General Counsel's motion to conform the pleadings to the evidence respecting minor variances such as dates. (17:2648.)

b. Threat to deny wage increases

Complaint paragraph 5(i) alleges that, about May 20, 1994, PDI, by Bassett, "threatened not to grant employees wage increases" because of their support of the Union. PDI denies.

According to Jean-Claude Demosthene, at the "first speech Bassett had spoken of going into employees' files to see whether there were any employees who could get a pay raise not given by Beaman. (4:554, 564.) Therefore, at the "May 20" speech [apparently the second speech, June 14], when Demosthene and others tried to ask questions about raises that were to be looked into by management, Bassett responded that they should not "mention" a raise "with that Union going on." (4:564.) On cross examination, Demosthene reports that Bassett said they should not "talk about that now." (4:640.)

Crediting Bassett that there were no questions at the June 14 meeting (20:3598), I find that the image Demosthene's memory actually was recalling, in distorted form, was the text which Bassett read (RX 33 at 8):

> An employee asked me this question the other day. If the employees vote No, will the employees get a pay raise? To answer this, remember that since we are in an NLRB election period, management is prohibited from making any kind of promise. So, we are prohibited by law from saying anything to you that would even imply that conditions of employment would be changed if the Union is defeated. Simply said, we cannot bribe you for your vote! Now, once this election is over and the majority of the employees vote No—the Company will be free to continue to follow its policies without having to negotiate anything with the Union. We will be free to talk directly with you about these concerns. Remember too that never in the Company's history have we had a pay or a benefit cut.

Ronald Casco testified that, at the first meeting of May 17, he and a couple of other employees asked why PDI employees did not get pay raises "like everybody else around the business." Asked whether Bassett responded, Casco testified, "Not that I remember." Also, a couple of employees asked why they had not gotten raises for the last 2 years. Casco does not remember whether Bassett answered. (6:968, 970.) On cross examination, Casco recalled that he was one of the employees asking why employees have not received a raise in the last 2 years, and that Bassett answered that it was illegal for him to talk about money or raises at this time. When Casco also asked why the employee sitting beside him had not gotten a raise promised him 2 years earlier, Bassett replied "Because there was a movement for a union." (8:1198–1199.) Demosthene does not recall whether there were any questions asked at the close of the May 17 speech. (4:636–637.)

Bassett seems clear that, at the first meeting he was not asked a question about money or raises. He is unable to say for certain that the debate among employees did not include comments about pay raises. (23:4033–4034.) Even if Bassett was asked about pay raises at the first meeting, I find he responded that it was illegal for him to discuss the subject at that time because "we are in an NLRB election period and management is prohibited from making any kind of promise." It is quite possible that Casco interpreted the quoted portion as a reference, as he describes, to the Union. Nevertheless, I find that Bassett, consistent with Casco's concession that Bassett first referred to the illegality of his discussing the matter [it may not be illegal, but that response is a safe harbor] and then further replied in the language later given in his second speech.

Finding no merit to this allegation of a threat by Bassett, I shall dismiss complaint paragraph 5(i.)

c. Threat to close

Complaint paragraph 5(j) alleges that, from mid May to late June, PDI, by Bassett, "threatened to close its warehouse if its employees selected the Union as their collective bargaining representative." PDI denies.

In support of this allegation, the General Counsel and the Union rely on the testimony of four employees, all of whom were among those laid off effective August 11, 1994:Angela Olga (Lampin) Wilson, Jean-Claude Demosthene, Ronaldo Hernandez, and Aundrai McGregor. In light of my earlier finding crediting Bassett concerning the manner in which he delivered his speeches, and that he did not deviate from the text, I do not credit the Government's witnesses. Although each appeared to testify with sincerity, the problem of the passage of time and number of speeches and videotapes, as discussed earlier, simply overwhelms the memory. Some examples will suffice.

Wilson did not give her first affidavit until November 18 (3:447)—over 4 months after the election. On maternity leave from March 31 until about mid June (3:440, 446), Wilson testified that, on her return to work, she attended two speeches by Bassett. (3:467.) At the first speech a video was shown about

Coca Cola. (3:438, 468, 474.) Before the video was shown, Bassett greeted the employees and spoke about Bill Beaman having been at fault, and that he wants everyone to work as a family. (3:437, 468–471.) The videotape reported that the only thing the union could bring was unemployment, strikes, discharges at the company's whim, and the closing of companies. "All of that was showed in the video." (3:438, 475.)

After the video presentation, Bassett spoke. He had no papers and did no reading. (3:438–439.) Bassett said that if the Union arrived [was voted in] that PDI would be closed (3:438), that (3:476) the only thing the Union could bring for the employees was unemployment, that the Union would not support the employees, that PDI could always close its doors and open up a new corporation as other companies had done, that PDI could close the doors and could open new ones. Wilson recalls that these were Bassett's statements, word for word, "because if you could imagine, it was the job that we were going to lose."

Some 4 to 5 days later, Wilson attended a second speech by Bassett. The same Coca Cola video was shown, and Bassett's remarks were the "same thing" he had said the first time. At this second meeting Bassett introduced Leo Belaunzaran, and Belaunzaran spoke. (3:479–480.)

Wilson's description of the Beaman topic, the Coca Cola video, and the introduction of Belaunzaran fits the last speech, on July 6. As the text of Bassett's July 6 speech (RX 36) shows, Bassett spoke almost entirely about personalities and personal relationships, not about collective bargaining, strikes, or the other hot issues of the campaign. The video, on the other hand, addressed those hot issues.

If Wilson actually attended two speeches, presumably being present in sequence, then she attended the fourth speech (RX 35), on June 29, and the third video (RX 25, transcript.) Recall that the speech of June 29 hits hard about strikes and strike replacements. Bassett read from the news article about nearly 700 striking members of the Amalgamated who were permanently replaced. Similarly, recall that the June 29 video opened with the narrator standing in an empty building—deserted because of restrictive union work rules and a lack of cooperation with the employer. (RX 25 at 9.) Thus (RX 25 at 9):

> In fact, that very thing happened right here at this plant. The employees voted a union in, and the company and the union bargained for almost two years. The company needed concessions from the union on contract changes to stay competitive, but the union refused. When the union threatened to strike, the company moved the operations to another plant [emphasis added], and all the employees at THIS plant had to find work somewhere else. THAT'S what can [emphasis added] happen when a union gets in.

Recall also that that later in the June 29 video the narrator talks about strikes and picket lines. Bassett admits that the video showed images of an unemployment office, picket line violence, and a man cocking a pistol. (23:3964–3966.) Earlier I quoted the narrator's closing remarks about replaced strikers having their names placed on a list, and a quotation from a Board decision that an employer may permanently replace economic [emphasis added] strikers. The narrator concludes by saying (by juxtapositional implication) that, with a union, there is no such thing as job security.

In short, I find that Wilson's memory was adversely impacted by the passage of time, and the difficulties compounded by the fact she attended two speeches and two video presentations. It is no surprise that her confused recollection differs from that which Bassett and the videotapes actually said. On this point, Henry F. Hill's entry, "Mixed Signals," in the Wall Street Journal of December 5, 1995, at A 19, in the "Pepper . . . and Salt" corner, comes to mind:

> What you claim you said Is not what I heard. What you say you implied Isn't what I inferred.

Return now to Demosthene's testimony. According to Demosthene, in reading his third speech, Bassett said (4:569–570, 663–668):

> He [Bassett] said okay, if you want to go for a union, this is what's going to happen. He would rather close [emphasis added] all the warehouses if the Union passed. Even if the Union passed, he knows he's not going to accept the contract. The Union people will force us to go into strike, and then the employees will then lose their jobs. In order to hold PDI's customer service, you would have to hire other people to keep the company going. The only way the employees will get their job again, if one of the people replace the employees during the strike or are sick or quit their job. That's the only way the employees that are willing to strike would get his job back. Other than that, there will be no other job even if the person that replaced him was still working.

Compare that with the following excerpts from the speeches and videotape transcripts. First, a quote from Bassett's third speech, on June 22 (RX 34 at 5):

> Bringing the Union in here means politics; it means hard core negotiations, it means hard bargaining, it means a lot of accusations and maybe a lot of arguing at the bargaining table. Maybe it means the Union takes a strike vote to try to put pressure on the Company to cave in. This could lead to a contract. This could also lead to a strike. That could mean no paychecks, no unemployment [compensation], and possibly being permanently replaced by other workers. Believe me—this can be very unpleasant.

Second, compare with this additional excerpt, from the narrator's remarks as shown in the transcript (RX 25 at 16) of the third video (Job Security—Union Style) shown during the fourth speech (RX 35) on June 29:

> And what happens when a strike finally ends? What happens when the picket line comes down? Well, no one really knows for sure, but one thing is for certain: the company has the right to keep operating with the replacement workers it hired during the economic [emphasis added] strike . . . and the strikers don't have to be returned to their jobs. That's right. The strikers' names will be put on a list, and they will be returned to work as jobs come

> open that they are qualified for. But that could be weeks, months, even years . . . and sometimes never.
>
> In the last few years, some very visible strikes proved the point, while thousands of strikes we've never heard about also made it clear that strikes are risky to employees and verified the National Labor Relations Board statement in a recent case when it said: "An employer may permanently replace economic [emphasis added] strikers."

Third, recall that during his fourth speech on June 29 (RX 35), Bassett showed a news article about some 680 strikers who had been permanently replaced after a 54-day strike. Bassett's closing comments were (RX 35 at 6–7) (with the news article Bassett read from being page 15 of RX 35):

> And what happened next is what we just saw on the tape [the third videotape transcript, RX 25, just quoted from]. When the 700 workers tried to go back to work, they found out that only about 20 of them had jobs. [Read from article.] "The remaining workers have been put on a recall list and will be called back as a situation warrants." The Union said [Read article] "The employers have chosen to reject our offer, which is made in good faith and is thumbing their noses at us." Folks, this is [these are] the facts. Here is living proof that in April 1994 almost 700 Clothing & Textile Union workers, who had put their faith and trust in the Union, went on strike and were permanently replaced. This is one specific example of what can happen with unions. We have seen this before right here in our community. Everyone remembers Eastern Airlines. It has devastated not only the jobs that were directly provided by Eastern but all of the other businesses that used to be up there on 36th Street. We all know people in this community who were devastated.

From the fourth video, "25th Hour," shown on July 6 during the fifth speech (RX 36), compare this passage from the narrator's remarks, with quotes from two Riverside Hospital picketers interspersed (RX 26 at 11–12):

> Another thing to think about is being permanently replaced, something the union doesn't often talk about. But we're sure the thousands and thousands of union workers who have lost their jobs [emphasis added] to replacement workers would have something to say. These picketers were asked if they were worried about being replaced: *RIVERSIDE HOSPITAL QUOTE*: "No the union won't let it, the union won't let it." Management did what it had to do to say [sic; stay] open and keep providing services to its customers: it hired replacements. The picketers found out how much the union's promises are worth. *RIVERSIDE HOSPITAL QUOTE*: "So we showed up yesterday at 7:00. They told us to go home that they had replaced us. We've been replaced."
>
> You get the picture. Strikers get replaced very often and statistics show it is happening more and more. And those replacements have the legal right to keep that job for as long as they want. The striker does get put on a preferential hiring list, but he doesn't get his job back until the replacement quits or is terminated.

Crediting Bassett's denial that he ever said he would close PDI if the Union got in (22:3842), and in light of the findings I have made concerning the manner in which Bassett delivered his speeches, I find that he did not so threaten. I disbelieve the contrary testimony by Wilson and Demosthene (quoted above), Ronaldo Hernandez (10:1576–1577), and Aundrai McGregor (13:2032.) Moreover, I note that Ronald Casco, who testified as a witness for the Government concerning, among other items, Bassett's preelection speeches (Casco attended three speeches, 8:1195), does not assert that Bassett said PDI would close. Based on my findings, and the record, I shall dismiss complaint paragraph 5(j)—which alleges a plant-closing threat by Bassett.

d. Threat to discharge

Complaint paragraph 5(k) alleges that, about mid May to mid June, Bassett "threatened to discharge employees if they selected the Union as their collective bargaining representative." PDI denies.

The General Counsel relies on testimony of the previously named witnesses that Bassett threatened to close, and also that in a strike employees would lose their jobs to replacements—evidence contrary to the credited testimony of Peter Bassett. In addition to that evidence, I note that Bassett acknowledges that at the end of his fourth speech a question was asked, at more that one speech session, regarding the matter of strikers being replaced by permanent replacements. Bassett specifically recalls one formulation of the question as starting with, "Do you mean that . . . ?" followed by the topic of (the strikers) being replaced by permanent replacements. (21:3762–3764, 3769.) Bassett responded by (as demonstrated at trial) rereading the portion of his speech dealing with the topic (21:3764–3769) RX 35 at 6–7) [The news article Bassett reads from describes how nearly 700 strikers, members of the Amalgamated, were replaced by permanent replacements]:

> And what happened next is what we just saw on the tape. When the 700 workers tried to go back to work, they found out that only about 20 of them had jobs. [Read from article]. "The remaining workers have been put on a recall list and will be called back as a situation warrants." The Union said [Read article] "The employers have chosen to reject our offer, which is made in good faith and is thumbing their noses at us." Folks, this is the facts. Here is living proof that in April 1994, almost 700 Clothing & Textile Union workers, who had put their faith and trust in the Union, went on strike and were permanently replaced.

Finding no merit to this allegation, I shall dismiss complaint paragraph 5(k.)

e. Implied threat of unspecified reprisals

Complaint paragraph 5(m) alleges that, about June 29, PDI, by Bassett "threatened employees with unspecified reprisals" if they selected the Union. PDI denies.

The General Counsel fails to specify the evidence on which the Government relies to support this allegation. The allegation date suggests that Bassett's fourth speech (RX 35), on June 29, is the target. Finding no such implied threat, I shall dismiss complaint paragraph 5(m.)

f. Threat of futility

Complaint paragraph 5(l) alleges that PDI, by Bassett, on dates from mid May to about June 29, "informed employees it was futile for them to select the Union" as their representative. PDI denies.

In support of this allegation, the General Counsel again relies on the witnesses whose testimony is contrary to the credited version given by Peter Bassett. For example, I have not credited the testimony that Bassett said he would close, or "rather close," the warehouse if the Union came in. Nor have I credited the testimony that Bassett threatened discharge by saying strikers would be permanently replaced and "lose their jobs." [The closest reference to that phrase came during the fourth video, on July 6, RX 26 at 11, as one of the narrator's comments, and is quoted earlier.]

Consistent with the General Counsel's trial position that the complaint attacks what was said at the meetings (23:4056–4058), neither the General Counsel nor the Union, on brief, argue alternatively that the written text of the speeches, with the videotapes (in the form of the transcripts) adopted, in effect, by Bassett, taken together, threaten futility. As neither the Government nor the Union makes such an alternative argument, I need not explore the merits of arguments not advocated. Accordingly, finding no merit to the Government's theory of violation, I shall dismiss complaint paragraph 5(l.)

8. Fleet Supervisor Robert Williamson

a. Introduction

Three allegations are leveled against Fleet Supervisor Robert Williamson in complaint paragraph 6. Paragraph 6(a) alleges that PDI, by Williamson, at the Miami warehouse, about May 13, 1994, "instructed employees not to engage in union and or concerted protected activities." PDI denies.

Paragraph 6(b) alleges, that, about June 9 and 29, Williamson "interrogated employees about their support of, and activities on behalf of the Union and the union support and activities of other employees." PDI denies.

About June 20, paragraph 6(c) alleges, Williamson " prohibited employees from waiting for employees in the facility, in order to discourage employees from engaging in union activities." PDI denies.

Persuaded by the testimony of the General Counsel's witnesses, and unfavorably impressed with the testimony of Williamson, I credit the witnesses of the General Counsel respecting complaint paragraph 6.

b. May 1994 coercive interference

Ronald Casco testified that, after Fleet Supervisor Robert Williamson attended one of two meetings held that day (apparently some time the second half of May 1994) for supervisors, Williamson returned and, as Casco was about to leave for the day, told Casco that he (Casco) was part of management and would have to be on the Company's side. Casco replied that he would be on the side he thought was good for him. And, Casco asked, if he were part of management, why was he not called into one of the supervisors' meetings that day. To Williamson's invitation that Casco come in and discuss the matter, Casco declined, saying he needed to leave. Casco does not recall the date of the meeting. Before this occasion, Williamson had never told Casco he had to be on management's side. Casco recalls no instance of ever having been told he was part of management or that he has any authority, for example, to recommend that an employee be disciplined. Casco wore a worker's brownish shirt, and supervisors wore different shirts which, unlike the shirt Casco wore, are marked "Supervisor." (6:955–964; 8:1272–1274.)

Williamson denies ever having such a conversation with Casco, and acknowledges that he never saw Casco, a checker around June 1994, directing employees, assigning them work, or attending any meetings of supervisors. (20:3383–3384.) PDI does not contend that Casco was a statutory supervisor.

The General Counsel argues that, if Casco is credited, a violation is established because Williamson, knowing that Casco was not a supervisor, nevertheless told him he had to be on management's side. Noting that Williamson never corrected his misstatement to Casco, and agreeing with the General Counsel, I find merit to complaint paragraph 6(a.) I therefore find that such a statement would reasonably tend to be coercive, especially when not corrected, and that PDI therefore violated Section 8(a)(1) of the Act, as alleged.

c. June 1994 interrogation

(1) June 9—Osberto Jerez

Osberto Jerez gave supporting testimony for this allegation. Jerez drove a truck for PDI from July 1992 to August 1995. (13:2092–2093.) Robert Williamson was his supervisor. (13:2097.) After signing a union card (GCX 12–44) on May 9 at the Tip Top Café (13:2093, 2110), Jerez distributed several union cards (13:2110, 2118.) Jerez was one of the employees who signed the May 12 and 19 letters (GCX 2), delivered some time during May, notifying Bassett and PDI that a majority of the Miami employees had signed cards for the Union. (13:2125.) Jerez also was one of those employees, including Vivian Fortin, who appeared as subpenaed witnesses ready to testify at the June 1 representation hearing. (13:2120.) Finally, Jerez is one of the seven Miami employees pictured on the face of the leaflet (GCX 20) the text of which solicited support of the employees at PDI's Ft. Lauderdale facility in adjoining Broward county. (13:2102.) That leaflet was distributed during June to employees at both Ft. Lauderdale (7:1067–1068, Casco) and Miami (9:1496, Fortin.) By early June, therefore, Jerez was an open supporter of the Union.

Jerez testified that, about June 9, as he was about to leave on his route, Supervisor Williamson called him to the back of the truck where Williamson, in an elevated voice, and with a serious and angry tone, asked Jerez what his picture was doing in a "bulletin" sent to the Ft. Lauderdale warehouse. Williamson said that Jerez should not be part of that group. The administration [management], Williamson added, already knew the leaders of the Union, and he named Vivian Fortin, Ronald Casco, Jose Castro, David Rondon, and Albert Rosado. (13:2097–2101, 2124.) Williamson denies that there was any such conversation, asserting that to have done so would have violated the TIPS instructions (20:3381–3383), but he admits that Bassett showed him a copy of the leaflet, containing, among others,

a picture of Jerez, as Bassett was preparing for, apparently, Bassett's second speech, delivered June 14. (20:3377–3380.)

Although Williamson asserts that he thinks he would have gotten into trouble had he violated TIPS, he does not think a violation of the TIPS instructions would have affected his job. (20:3418–3419.) Williamson's description of his understanding of the significance of the picture of Jerez and the other employees on the leaflet (GCX 20) is rather confusing. Williamson testified that he was "shocked" to see Jerez and Castro among those in the photo (they were the only two he had a chance to recognize in his "glance" at the leaflet), but he did not know what their presence in the picture meant, and he thought that they were present merely as employees, or leaders, not as supporters of the Union. However, he viewed them as supporters, and does not know if that includes leaders, nor does he know if the employees pictured were leaders. Williamson never came to believe that the employees pictured on the leaflet were either supporters or leaders of the Union. When I expressed confusion, Williamson commented, "I'm confused, too." (20:3380, 3425–3427, 3456–3460.)

Crediting Jerez, I find that Supervisor Williamson remarked as described by Jerez. Although the allegation, complaint paragraph 6(b), attacks an interrogation (prompting PDI to argue no violation, even if Jerez is credited, as it involved an open supporter of the Union), the essence of the remarks, with their elevated and angry tone in making a statement rather than inquiring, are in the nature of an implied threat of unspecified reprisals rather than an interrogation. In view of this substantial variance from the allegation pleaded, I shall dismiss complaint paragraph 6(b) as to June 9, 1994.

(2) June 29—Albert Rosado

Hired in August 1993, Albert Rosado drove a truck for PDI until late October 1994 when he was fired for being off his route. (13:2127–2128.) Ironically, he was fired by one of the (then) bargaining unit employees to whom he had distributed a union card—Leo Belaunzaran. (13:2129, 2134–2135, 2165–2166.) The National Labor Relations Board charge protesting Rosado's discharge was dismissed. (13:2161.) For about a week before the July 7–8 election, Rosado openly wore a union hat and T-shirt during the lunch period and after work. (13:2167–2168.) Rosado signed a card (GCX 12–45) at the Tip Top the evening of May 9 (13:2129–2130.) Rosado also signed the Spanish version of the May 12 (GCX 2b) and May 19 (GCX 2d) letters to Bassett in order "to let Peter Bassett know that I was supporting the Union." (13:2168–2170.)

Robert Williamson was Rosado's supervisor. (20:3387.) Rosado testified that, about noon the same day that Bassett gave his June 29 speech, Supervisor Williamson approached Rosado as he (Rosado) was at the dock loading his truck. Just the two were present. Although it is unclear whether there was one or two conversations at about the noon hour, the initial topic was Williamson's telling Rosado to attend Bassett's speech that day. (13:2153, 2172.) For the second topic, Williamson asked Rosado if he knew who was the head of the Union and who had signed cards for the Union. Contrary to the truth (13:2173), Rosado replied that he did not know. Rosado continued loading his truck, and Williamson left without saying anything further. (13:2152–2153, 2173–2174.) Williamson denies any such interrogation. (20:3388.)

Crediting Rosado, and disbelieving Supervisor Williamson, I find that the interrogation occurred and that it was coercive. Unlike some casual inquiry, especially among friends, about the reasons for wanting a union, Williamson's questions bore the mark of Cain—expressly suggesting future retaliation against not only the leaders, but also against those who, by their signatures on cards, were responsible for the upcoming union election. Such interrogation is coercive, and therefore a violation of Section 8(a)(1) of the Act, even if the interrogated employee is an open supporter of the Union. Finding merit to complaint paragraph 6(b) as to June 29, I therefore find that PDI violated Section 8(a)(1) of the Act by Supervisor Williamson's June 29, 1994 interrogation of Albert Rosado.

d. June 22, 1994—Ronald Casco denied access

After his work shift ended at 5 p.m. about June 22, Ronald Casco testified, he went to the cafeteria to wait for Vivian Fortin because Fortin needed a ride. The time was about 5 to 10 minutes after 5 p.m. As Casco was enjoying a soda and some crackers and talking with five or six drivers who were there on break, Supervisor Williamson came and told Jerez, "Get out of the building. You already punched out. You're not supposed to be in the cafeteria when the drivers are still on break." Replying (contrary to the truth) that he did not know the drivers were on break, Casco added that he had punched out, was waiting, and that there was no rule requiring him to leave the cafeteria after he had punched out." Ignoring Casco's response, Williamson repeated his command that Casco leave the warehouse. Casco complied. During his tenure at PDI, Casco testified, the only employees told to leave the premises after their work shift have been those who were fired. (7:1070–1073.) In addition to his having signed the May 1994 letters to Bassett (GCX 2), Casco also distributed union literature to Supervisor Williamson at the lunch truck outside about June 9. (7:1069–1070.)

According to Williamson, he recalls an incident one day that June on seeing Casco in the cafeteria after his shift had ended at 4:30 p.m. Casco was talking in Spanish (Williamson does not understand Spanish) with some drivers, including Jose Castro and Cesar Umana. Because it was unusual for Casco to be in the cafeteria with the drivers, Williamson reported the matter to his supervisor, Leo Belaunzaran. Williamson did not speak directly to Casco because he felt the proper action was to report to Belaunzaran. According to Williamson, Belaunzaran said he would look into the matter. Williamson denies telling Casco to leave the property, admits that he knows of no rule requiring an employee to leave after work, and claims that he has reported similar incidents involving employees other than Casco. (20:3384–3387, 3427–3437.) Williamson asserts that, other than the June incident involving Casco, he has never observed any employees remaining in the cafeteria after their work shift has ended. (20:3471, 3475.) Usually, Williamson states, if employees are waiting for a carpool ride, they wait in a rest area outside the lunchroom. (20:3474.)

In crediting Casco, and disbelieving Williamson generally, I note that Williamson spoke harshly to Cascom—overkill moti-

vated, I find, by a belief (erroneous, it turns out) that Casco was discussing the Union with the drivers. [Actually, Casco was not (7:1072), although that fact is immaterial.] While Williamson's concession, that there was no rule requiring Casco to leave the cafeteria (20:3435), is in the nature of a confession (no such rule) and avoidance (immaterial because did not enter cafeteria but went to Belaunzaran), the admitted fact remains. Although Williamson disputes Casco's version, at trial he offered no business justification for commanding Casco to leave.

Agreeing with the General Counsel, I find that Williamson's command that Casco leave the warehouse amounted to an unlawful no-access rule. *Tri-County Medical Center,* 222 National Labor Relations Board 1089 (1976.) Accordingly, finding merit to complaint paragraph 6(c), I therefore find that PDI, as alleged, violated Section 8(a)(1) of the Act by Supervisor Williamson's June 22, 1994 command that Osberto Jerez leave the warehouse cafeteria. *Postal Service,* 318 NLRB 466, 466 (1995); *Nashville Plastic Products,* 313 NLRB 462, 463 (1993.)

9. Office Manager Luisa Pacheco

Complaint paragraph 7 alleges that, about June 20 at Miami, PDI, through Luisa Pacheco, "threatened employees with unspecified reprisals because they supported and assisted the Union." PDI denies.

Arriving early, about June 20, at the cafeteria for one of PDI's meetings concerning the Union, driver Jose Castro found only Office Manager Luisa Pacheco present. Pacheco greeted Castro with, "Mr. Peter Bassett is upset with you because you sold yourself to the Union." (11:1789.) [Recall that Castro was one of the signers of the May 12 and 19 letters (GCX 2), and that he is one of the seven employees in a photo made part of the Union's leaflet (GCX 20) which was distributed in the first half of June.]

Castro asked Pacheco why she was saying this, and she replied by asking whether he had forgotten that PDI had made him a loan. "Yes," Castro answered, but he had already repaid the loan. That ended the conversation because others began arriving for the meeting. (11:1788; 12:1855–1857.) Castro's time estimate for the conversation of "not less than 5 minutes" (11:1790) seems strangely long, and would make more sense if the estimate were "less than 5 minutes." In any event, Pacheco denies having any conversation with Castro about Bassett, and denies telling Castro that Bassett was upset with him because he had sold himself to the Union. (19:3247.) Castro testified more persuasively than did Pacheco, and I credit Castro.

Having credited Castro, I find that Pacheco's statement reasonably suggests that bad things would happen to Castro in the future because the division president himself was upset with Castro over the latter's having sold himself to the Union. What really rankled Bassett, as revealed by Pacheco's comments, was Castro's treachery, in PDI's view, in supporting the Union after having accepted the favor of a loan from PDI. Pacheco's remarks constituted a threat of unspecified reprisals for assisting the Union, and they violated Section 8(a)(1) of the Act, as alleged by complaint paragraph 7. I so find.

10. Warehouse Manager Leo Belaunzaran

Complaint paragraph 8 alleges that, about May 27, 1994, PDI, through Warehouse Manager Leo Belaunzaran, at the Miami warehouse, "threatened employees that it would not confer any wage increases until the Union activities had ceased." PDI denies. Jean Claude Demosthene testified in support of this allegation.

According to Demosthene, at the second meeting, where the "hotline" was mentioned, which Demosthene dates as about May 20 or (Sunday) May 22, and which, I have found, was held on June 14, employees tried to ask Bassett about pay raises. When Demosthene and others asked about a pay raise, Bassett assertedly told them not even to think about, or mention, a pay raise "with that Union going on." (4:564, 654.) Demosthene states (4:564) that he asked because at the first meeting May 17) Bassett had told (4:554, 658) employees to give him time to inspect the employees' files to determine whether any employees were entitled to raises not given by Bill Beaman. Cross examination disclosed that, in fact, Demosthene had not been one of those asking questions about raises. (4:640.) Indeed, only one employee asked a question about raises (4:653), and he asked (4:654) when he was going to receive his own raise. When Bassett replied, as described by Demosthene, Demosthene had his answer and did not ask his own question about raises. (4:657.)

About a week later, or about May 27 (4:566, 639, 654), and in the absence of any report by Bassett that he had inspected the files (4:658), Demosthene went to see Belaunzaran. [If this came a week after the second speech, then the date would have been June 21.] Demosthene's hiring anniversary was in April, and, after allowing an extra month to see if he would receive a pay increase, and receiving none, Demosthene went to see Belaunzaran to ask about it. According to Demosthene, Belaunzaran told him "not to even think" about a raise "because of the Union." Demosthene responded that the employee handbook did not refer to a union. [As might be expected, the "Performance Evaluation" section of the employee handbook, which briefly mentions merit pay adjustments, has no qualifying language about union campaigns, current or otherwise. RX 40 at 15.] Belaunzaran responded that no one would receive a raise "because of the Union," not even Belaunzaran himself. (4:566–569, 654–658.)

For his part, Belaunzaran denies having any such conversation with Demosthene. (18:3069, 3114.) His instructions were not to discuss pay raises with anyone during the organizing campaign, and he followed those instructions. (18:3119.) If anyone asked, and Belaunzaran does not recall that anyone did, he told them that he could not discuss it with them at that time. (18:3119–3120.)

There is some testimony by Belaunzaran, during the Union's cross examination, concerning whether, on June 16, 1994, Demosthene was promoted from stocker to checker, with a pay increase of 25 cents per hour. Belaunzaran confirms, on cross examination, that his pretrial affidavit so states. (18:3117.) As the Charging Party elicited the evidence, I consider the pretrial statement as an admission of the fact by PDI's warehouse manager.

The only relevance here of the promotion and pay increase is twofold. One, it possibly was the occasion for a conversation between Demosthene and Belaunzaran about the promotion and pay increase. Belaunzaran distinguishes between pay raise of the merit and general types, and a pay increase incident to a promotion (18:3117, 3122–3123), denying any conversation with Demosthene about the former (18:3118), recalling that either he or a supervisor could have notified Demosthene of a promotion (18:3120–3121), and declaring only that he may have discussed a pay increase incident to a promotion with Demosthene. Certainly the time frame fits the sequence of speeches better, for a week after Bassett's second speech of June 14 would have been June 21. But, as PDI observes (Brief at 41), the date of June 21 creates a new contradiction–it is highly unlikely Demosthene would have been asking about a raise just a week after having been promoted and his pay increased.

The second aspect of relevance pertains to a theory advanced at trial by the General Counsel. The General Counsel there asserted (4:681–682) that a possible reason for Demosthene's going in to Belaunzaran and asking for a raise is that for a time Demosthene believed that PDI viewed him has a pro-company vote. This belief is based on at least one, and probably two, facts. First, when Bassett ended his first speech (on May 17), Demosthene remarked for all to hear that the employees should give Bassett a chance to make good, and if he did not, "We'll go back to the Union." (4:633, 636, 679–680; GCX 16 at 3.) Second, Demosthene was promoted from stocker to checker on June 16. That time frame would fit a late May visit by Demosthene to talk with Belaunzaran about a pay raise. The problem is that Demosthene ties his visit to Bassett's second speech, and that did not occur until June 14. In any event, about mid-June, apparently after he was promoted, Demosthene began having almost daily conversations with Monica Russo, the Union's representative, at the gate. From that, and his conversations with Ronald Casco, Demosthene formed the belief that PDI viewed him as favoring the Union. (4:691–692.)

Discussion of these "possible" motivations and sequences amount to factual byways, not really pursued by the parties on brief. Indeed, the record is only partially developed concerning these byways. I have described them because they assist in demonstrating the uncertainty which surrounds Demosthene's description of the facts. As discussed earlier in conjunction with the allegation of a threat by Bassett to withhold pay increases because of the Union, an allegation I dismiss based on crediting Bassett, I found there that Demosthene's memory had distorted what Bassett actually had said at the June 14 meeting about pay raises. I further found that there were no questions at the second meeting.

In short, I am unable to rely on Demosthene's description. For example, Demosthene initially asserts that Bassett, at the second meeting, told employees who asked, including Demosthene, "not even to think about a raise with that Union going on." (4:564.) That changed, on cross-examination, to "not to even talk about that now." (4:640.) Demosthene then disclosed that someone else, not him, had asked (4:640, 653), and that employee had asked about a pay raise for himself (4:654), to which Bassett assertedly advised (4:654), "not to even think about a raise with that Union." Finally, Demosthene concedes that he told the Board agent taking his pretrial affidavit that Bassett said he would not answer the question about a pay raise. (4:658.)

Thus, Demosthene's erratic trial description crumbles as he proceeds. Moreover, I note that the phrase he first assigns to Bassett—"not to even think about a raise"—he also (4:566-567) accuses Belaunzaran of making. Belaunzaran could have picked it up from Bassett had Bassett made the statement, but I have found that Bassett did not make it. Not crediting Demosthene's account, and crediting Belaunzaran that he had no conversation with Demosthene about a (merit or time-in-grade) pay raise, and did not make the remarks alleged by Demosthene, I shall dismiss complaint paragraph 8.

11. Supervisor Hector Ortiz

Two allegations are involved here, both alleging violations by Supervisor Hector Ortiz in early July, the first a threat of discharge because of union support (complaint par. 9), and the second (par. 10) an offer of money to discourage support of the Union. PDI denies. Jose Castro testified in support of the allegations, but Ortiz, who no longer works for PDI, did not. Although Castro had difficulty with dates, I credit his unrebutted testimony. Neither party cites any cases, but PDI does present argument that the facts, even if Castro is credited, do not rise to the level of a violation. Although briefing the facts generally, the General Counsel presents no argument.

The threat-of-discharge incident (par. 9) occurred either about mid-August (11:1796), in July (11:1801), or in June (12:1859.) On this occasion, whenever it was, as Castro and Ortiz worked together at loading dock eight, they debated the pros and cons of the Union. After some discussion (none of which is described in the record), Castro asked Ortiz by what moral authority did he state his points when he formerly took sexual advantage of a woman working under his supervision. Ortiz said he could have Castro fired for making that remark. (11:1795–1796.)

Clearly Ortiz' threat was directed at Castro because of Castro's accusation, not because Castro supported the Union. Although I could speculate about a theory, by analogy to cases involving union stewards in heated discussion of grievances, such speculation is precluded. Accordingly, as the legal theory expressed in the allegation is without merit, I shall dismiss complaint paragraph 9.

The offer-of-money incident (par. 10) occurred either in early July before the election (11:1791, 1796) or in June (12:1859, 1868.) On this occasion, whenever, it was, a grinning Ortiz, while acting as if to remove his wallet, told Castro he would give him $200 if the Union did not win so "you good guys could try and organize yourselves again." Castro told Ortiz to go ahead and give him the money. Apparently Ortiz declined that suggestion. (11:1790–1790.) In giving his pretrial affidavit, Castro states (12:1867), he considered the incident a joke.

The facts establish that Ortiz' conduct was nothing more than a silly joke. The allegation's theory is that a serious offer was made to bribe Castro to vote NO in exchange for the payment of $200. The undisputed facts fail to support that theory.

There are many cases which discuss disparagement of unions and union supporters. As the General Counsel advances no legal theory of unlawful disparagement on the facts presented here, I need not discuss that theory or Section 8(c) and the free speech right, absent a threat, to engage in parody, ridicule, comedy, jokes, or even insults. Because the only legal theory advanced is that set forth in the allegation, and as the evidence fails to support the allegation, I shall dismiss complaint paragraph 10. Turn now to the remaining allegations of discrimination.

F. Alleged 8(a)(3) Discrimination

1. Introduction

Earlier I covered two allegations (pars. 11 and 12) which are related to Section 8(a)(1) allegations of coercion. Four discrimination allegations remain (pars. 13-16), and two of these (pars. 14 and 16) also allege violations of Section 8(a)(5) of the Act. The major portion of the remaining discrimination allegations pertain to alleged discrimination against Vivian Fortin (pars. 13, 15, and 16), with paragraph 14 attacking wage increases granted in July. The descriptions by Bassett and Vice President Mark Noble of the wage increases, layoffs, and discharge of Vivian Fortin show, as PDI presents it, that there is a common background—they are directly related to PDI's efforts to reduce costs and to improve productivity. I therefore first summarize this background.

2. Background

As I mentioned earlier, when describing PDI's operations and senior management, about June 1, 1994, Al Woods became PDI's president. (17:2736, 2820; 22:3923.) According to Peter Bassett, even before Woods arrived, Robert Tennant, the corporate Human Resources Director (20:3595), came to Miami during the week of May 16, the week following the filing of the Union's election petition. (21:3816, 3818; 22:3936.) One of the matters Bassett and Tennant discussed was the fact that Bassett's division was not conforming to the corporate policy of annual performance evaluations about the date of an employee's employment anniversary. Indeed, the November 1991 Employee Handbook states that annual performance reviews "are to be scheduled every 12 months," with "merit-based pay adjustments" to be awarded in an effort to recognize "truly superior employee performance." (RX 40 at 15.)

Bassett admits (21:3817–3818) that he had not been following corporate policy and had deferred such evaluations, sometimes for several months. (21:3816–3818.) [The evidence suggests that some deferrals were not just for months, but for years. Indeed, Bassett concedes he came to believe that his failure in this regard "might have" contributed to the employees' seeking representation by the Union. 22:3874.] Tennant observed to Bassett that the turnover rate in Bassett's division (or perhaps just Miami) was about 60 percent. (21:3819.) The two decided that a wage survey should be done, to proceed with granting whatever wage increase was indicated to be competitive, and to begin, as soon as possible, performance evaluations which would lead to merit pay raises. (21:3819; 22:3935–3936.) After consulting with counsel, Bassett decided to hold implementation of the general wage increase and the performance reviews until after the election. (21:3820.)

Within a day or two following the July election, or about July 10, Tennant informed Bassett and Al Woods that his wage survey had revealed a need for a general pay increase of 25 cents per hour to be competitive in the south Florida area, and he recommended to Bassett and to Woods that such a general pay increase be granted immediately. Bassett (and Woods, presumably) approved, and a general pay increase for all southern Florida personnel (from Miami to Fort Myers—some 120 employees, 21:3821; 23:4045) of 25 cents per hour was granted immediately. (21:3820–3821; 22:3935–3937.) Although Bassett, on two previous occasions, had approved general pay increases on a departmental basis (some 10 to 12 Miami telephone room employees in June 1993, and no more than 20 Miami truckdrivers in 1992: 21:3823–3824; 23:4044–4045)—he apparently had never approved or granted a general wage increase for all employees, such as that for the approximately 120 employees involved here.

As discussed in more detail in a moment, on July 20 Bassett announced to employees that they would received a general wage increase of 25 cents per hour, and that it would be reflected in their first August paychecks. (GCX 158 at 3; 21:3815; 23:4083, 4088.) The performance evaluations began in July and continued into September, with various individuals receiving merit pay increases. (21:3816, 3823; 22:3937–3938.) Some of those who received merit pay increases were laid off within a few days of receiving their August merit increase. (22:3937.)

Bassett concedes that, as of the time he was implementing the general pay increase, and the performance reviews which could lead to individual merit increases, "top management" (meaning, outside of himself, Al Woods—22:3922) was concerned about the labor costs at the Miami facility. (22:3938.) Indeed, as Bassett explains generally, shortly after Woods arrived as PDI's president, the accounting department at the Roanoke headquarters supplied Woods with production numbers. These numbers and computations became, or were incorporated into, a documentary analysis called a "performance shell." (22:3931–3932.) The performance shell reflected, Bassett testified [no copy of the performance shell is in evidence,[9]] that Bassett's division was below the corporate standard for productivity. (22:3932.) PDI measures productivity in terms of annualized sales per FTE (full-time equivalent, or an employee who works 40 hours a week) by operation. (17:2741–2743, Noble; 22:3931; 23:4072–4073, Bassett.)

Pursuant to Woods' direction, sometime between June 20 and July 11, Bassett testified (22:3932, 3934), Bassett submitted a cost reduction plan (plan) to Woods. The plan included a productivity analysis and suggestions for reducing the number of employees. The plan was discussed with Woods and other top managers in a telephone conference call on a Monday after the election. During that conference call, Woods expressed

[9] The complaint does not allege that the reductions in force for August and October 1994 were unlawfully motivated. Much of the evidence regarding Bassett's cost reduction plan, to be described in a moment, was elicited during cross-examination of Bassett.

concern about the FTEs (a shorthand reference to PDI's formula for measuring productivity.) That conference call was followed by a visit by Woods to Miami where there was a "much more detailed discussion." (22:3929–3932.) Although Bassett was not able to give the precise date of either the telephone conference call or of the subsequent Miami visit by Woods, the approximate date of the conference call apparently was about late July or early August when, Bassett testified, Woods first expressed concern about the productivity problems which Bassett was experiencing. (22:3923.) This concern apparently differed from the concern expressed in June when Bassett's numbers in the performance shell were subpar and Bassett was directed to furnish a cost reduction plan. With this late July-early August expression, Woods said he thought PDI was overstaffed by 25 to 40 employees. (22:3923.)

Although it jumps ahead in the story, some clarity is provided by here considering some of Noble's testimony. As I later discuss in more detail, Vice President Mark Noble handled the October 1994 layoffs at Miami, including the layoff of Vivian Fortin. Although Noble was not involved in Miami's August 1994 layoffs, he testified that Woods, unhappy that PDI (assertedly) was below the industry's standard for productivity, "mandated" that PDI reduce its staff by 40. Woods told Noble to reduce the support staff in Roanoke by 10 and the warehouse distribution group by 30. (19:2739.) Although Woods did not testify, and even though the evidence is rather skimpy concerning the corporate decision to have two layoffs in 1994, President Woods apparently decided on one layoff in August, and a second one in October. Annia Vigos testified that, in Miami, the August layoff hit the warehouse, and the October layoff was of office employees. (11:1748.)

Of the 25 Miami employees Bassett laid off (or who left for other reasons) in August 1994 (23:4072), 12 were named in a unfair labor practice charge (RX 49) filed by the Union. NLRB Region 12 dismissed that charge. (24:4107.) The 12 are among the 13 named in complaint paragraph 17 as having been laid off August 10 [the effective date was August 11—GCXs 11, 13, 25] in violation of Section 8(a)(5.) Bassett testified that the August layoff was part of his cost reduction plan. (24:4154.)

As I mentioned earlier, Bassett acknowledges that, at the same time Bassett was implementing the general and merit pay raises of July-September 1994, both Woods and Bassett were concerned about the labor costs at Miami. (22:3922, 3938.) For the General Counsel, this is an apparent contradiction of purposes—a need and program to reduce costs and personnel and increase productivity on one hand, while on the other hand granting a general pay increase and playing catch-up on performance reviews and, as indicated by the reviews, awarding merit pay increases. That apparent contradiction, combined with the timing of the double-barreled pay raises (given at a time when objections to the election could be, and were, filed), and the unprecedented nature of the general pay increase (never before had Bassett granted a general pay increase to all employees), expose the hidden reason for the dual pay raises—the unlawful motive of granting the pay benefits in order to unlawfully influence the bargaining unit in the event a second election were directed. (22:3928–3929; Brief at 126.)

Not so, says Bassett. There is no contradiction because he had a three-pronged approach for reducing costs:(1) improve productivity, (2) reduce costs, and (3) increase pay. (23:4070.) Bassett did not reverse the pay raise decision when Woods directed Bassett to submit a cost reduction plan because Bassett saw no need to do so. Proceeding with the pay raises was not inconsistent with the other two prongs because, Bassett testified (23:4071), Miami successfully improved productivity through reengineering efforts (changing the conveyor system in the warehouse, and repositioning work stations to increase efficiency.) Contrary to PDI's assertion (Brief at 79), Bassett did not testify he approved the general and merit wage increase plan, in the face of a cost reduction plan, so that the pay raises would assure employees they were being paid adequately. In other words, Bassett assertedly installed a "lean and nice" program. The "lean" part was the increase of productivity through layoffs (under PDI's productivity formula, total sales divided by fewer workers means higher productivity) and greater efficiency (the reengineering), while the "nice" part consisted of rewarding the fewer remaining workers, the "chosen," with higher pay to reassure them and keep their morale high. While that purpose perhaps could be inferred from the circumstances, so also may an unlawful motive be inferred—a desire to encourage employees to abandon their support of the Union during the objections period.

At this point it may be helpful to review the text (GCX 158) of Bassett's remarks to the employees when, at meetings on July 20 (23:4088), he informed them of the three-part wage and productivity improvement program. (23:4084–4086.) One caveat applies. Because of colloquy at trial, Bassett, who had testified that his delivery did not follow the same method that he had used for his speeches (23:4086), was never pressed to answer the follow-up question (23:4086) of how the methods differed. However, enough clues exist to make a finding, which I do, that his July 20 presentation was far more informal. Thus, when Bassett asserts that GCX 158 (a two-page English text, plus a cover page with date, plus Spanish version, plus attendee schedules) is the "displays and subject matter that I discussed" (23:4084), I take that to mean he did not take pains to see that his delivery was word for word, with no deviation; that his presentation was more informal, allowing for some discussion.

And indeed Bassett's presentation was more informal. Thus, Jose Castro credibly describes how Bassett thanked God that everything had passed, that everything was "relaxed and calm," and he was going to remain with those employees he considered were the ones he could trust, like the "chosen" ones. (11:1803.) I also credit Annia Vigos who reports that Bassett told her group of 20 (11:1743) to 24 (as scheduled, GCX 158 at 9) employees that the employees would have a lot of benefits "after the Union left," that there would be raises for everyone, plus evaluations, with raises according to the evaluations. (111743–1744.)

About the date Bassett addressed employees on July 20, he apparently posted a memo advising employees of the general 25 cent wage increase. Jean Claude Demosthene describes such a memo as having been posted before the meeting at which Bassett announced the raise. (4:574–575.) Jose Castro,

on the other hand, asserts that the memo he saw was posted after the meeting. (11:1802.) I credit both. Contrary, I find, to the suggestion by Bassett (22:3832), for Castro the postelection general wage increase was the first raise of any kind he had received since starting work at PDI in December 1991. (11:1776, 1805; 12:1857–1858.)

Turn now to the exhibit (GCX 158.) The text consists of two separate one-page memos. Actually, although both memos end with "Sincerely, Peter Bassett," only the first one has a salutation, "To All South Florida Employees." (GCX 158 at 2.) Even though I need not make a finding, there is a sufficient basis for inferring that it is this memo which was posted. Besides announcing the 25-cent general wage increase and performance evaluations with earned merit wage increases "based on your individual performances," the memo covers items such as training, communications, small group meetings, performance standards and "improved productivity," awards, and solicits employee suggestions.

The second page of text, bearing the heading "Three Part Wage and Productivity Improvement Program," has in introductory portion, followed by a second headline concerning the "Wage Improvement Program." The first item under that is the general increase of 25 cents (announcing that it would be reflected in the first August paycheck), followed by a paragraph under the heading, "Performance Evaluation and Merit Increase Program." The final heading is for the "Productivity Improvement Program"—or PIP. As stated at trial, receipt of this exhibit was for the purpose of adding clarity of articulation to the evidence about the relationship of productivity and the wage increase. (23:4088-4090.) With that in mind, it may help to quote some of the statements. The introductory portion reads (GCX 158 at 3):

> We are pleased to announce this three part wage and productivity improvement program for all South Florida Parts Depot warehouse, driver, customer service and office employees.
>
> Goals for this program are to provide an immediate general wage increase for all employees, immediately followed by a performance evaluation and merit increase program based on individual performance. Concurrent with the wage improvement program, we will be implementing several productivity improvement programs designed to lower our cost base and to insure all employees have an opportunity for continue improvement. We will be asking for your assistance and participation in improving efficiency. Your cooperation and participation will help PDI become a more efficient warehouse operation in order to justify the wage increases and to provide a work place more efficient for future and continue improvements.

Under the heading for "Performance Evaluation and Merit Increase Program," the memo provides:

> Effective immediately, your supervisor and manager will begin conducting a performance evaluation for all employees on the payroll for one year or more and who have not had a merit increase in the last 12 months. The evaluation is expected to be completed within the next three weeks. Employees who have had a merit increase during the last 12 months or were not on the payroll for one year will be evaluated again on the anniversary of the last merit increase or their one year employment anniversary. Merit wage increases will be awarded in addition to the 25 cent general increase depending on your individual work performance.

The final paragraph, under the PIP headline, reads:

> The economic conditions that prevented wage increases in the South Florida automotive aftermarket have not improved over the last three years. We must pull together as a working team to improve our efficiency and to provide a secure future for all of our employees. You will see a lot of activity over the next several weeks to improve productivity. We are asking your cooperation, participation and suggestions as we move forward together in a total PDI Improvement Program.

One last bit of background evidence should be addressed. The Government introduced a summary (GCX 151) which the General Counsel compiled from subpenaed payroll records. (18:3020, 3030.) Although PDI agreed that the underlying documents are authentic (18:3022; 20:3477), it objected (18:3022, 3027; 20:3477) to receipt on the basis that, with only 45 names and 40 explanatory footnotes, the exhibit is both incomplete and unreliable and, in any event, the document has no relevance. At trial the General Counsel and the Union countered the objections by arguing that the exhibit, as a representative illustration of the payroll records, is sufficiently complete and, in that respect, reliable. As to gaps suggested by the many footnotes, the footnotes merely highlight the discrepancies, or pattern of such, reflected in the payroll documents themselves. (18:3021, 3027–3028.) The Union argued that the big gap shown is the absence of an entry on the records explaining the basis for a pay increase in late July 1994. (18:3028.) In receiving the exhibit, I advised the parties that the weight I assigned to it could be little. (18:3025; 20:3478.)

On brief the General Counsel apparently argues that the summary shows that some employees went for years without receiving a pay raise. Assuming, without finding, that such is so, it skips a very important step. Before a merit pay increase [presumably the General Counsel is referring to merit raises] can be granted under PDI written policy in the employee handbook (RX 40 at 15), there must be a performance evaluation. Under the written policy of merit raises for "truly superior" performance, merit raises are far from automatic. As the Government's summary exhibit considers only pay raises, it fails to account for the critical component of performance evaluations. Thus, the absence of a pay raise could well be because the employee received a performance evaluation in which the supervisor did not recommend a pay increase. That is a fatal flaw in the summary's relevance.

The Union's trial argument (the Union did not brief the wage increase allegation), that no entries appear for the July 1994 general wage increase is answered by Bassett's testimony that there was no need to prepare personnel action request forms, or PARs (22:3856; 23:4058), for everyone because his letter (not in evidence) so directing for everyone was sufficient. The

change was universal, not "transactional." (23:4063–4064, 4079-4080.) In any event, as GCX 151 was received before Bassett took the stand and admitted that a general pay increase was granted in July 1994, the Union, by not briefing the matter, apparently understands the matter to be moot. So finding, I attach no weight to GCX 151.

3. Wage increases granted in July–September 1994

a. Contentions

Complaint 14 alleges that, about mid July 1994, PDI "granted wage increases to its employees in order to discourage them from joining, supporting, or assisting the Union." PDI denies.

Arguing unlawfulness, the General Counsel points to several factors. First, Bassett admits that his decision to grant a general pay increase, and his decision to conduct individual performance evaluations and to grant whatever merit increases were in order, both came shortly after the Union filed its May 13, 1994 election petition. That is, the decisions were made during the critical preelection period, notwithstanding that their implementation was delayed, on advice of counsel, after the election.

Second, the implementation of these dual raises (one general, one a potential merit increase depending on the results of each individual's performance evaluation) suffer the triple voodoo of (1) the malodorous timing of coming while the outcome of the election was, and still is, unresolved; (2) raising the cost of individual labor in the very midst of a cost reduction program (the plan, as Bassett knew, would entail layoffs), which was mandated by Bassett's superior, Al Woods, PDI's president; and (3) departing from Bassett's own past practice of ignoring PDI's corporate policy (the latter calls for annual performance evaluations with merit pay increases, as indicated) and delaying such reviews, and merit raises, for months, even years, and switching to conformance with that corporate policy when it was convenient to use it as a pretext for persuading employees they did not need the Union should a second election be directed, and to undercut the Union's bargaining strength should the Union ultimately be the winner or PDI otherwise be ordered to recognize and bargain with the Union.

Citing *LRM Packaging,* 308 NLRB 829 (1992), PDI argues that an employer may lawfully give wage increases after a union election. Moreover, relying on *Springfield Jewish Nursing Home,* 292 NLRB 1266 (1989), PDI argues that an employer may grant a pay raise even during the critical preelection period where it does so for the purpose of remaining competitive. On this point, PDI cites Bassett's testimony (21:3819) that the raises were needed to stanch the 60 percent turnover hemorrhage. As to granting the pay raises during the cost reduction program, PDI points to Bassett's explanation (23:4071) that the pay raises were not inconsistent with the program because productivity would be, and was, increased by layoffs (25 in August) and improved efficiency through reengineering.

b. Discussion

But those steps—laying off 25 employees and reengineering for more efficiency—did not require that the dual pay increase be granted. Although PDI (Brief at 79) ascribes the additional ground of incentive for those employees who would remain [to "assure the employees were being paid adequately," and "PDI was going to demand that is employees work harder"; Brief at 79], Bassett never voices that reason either at trial or in the prepared text (GCX 158) for his July 20 announcement. Of course, that reason perhaps can be inferred from the circumstances, but failure to list it must be weighed in the process of resolving credibility.

Now reaching that point of resolving credibility, I do not believe Bassett. Bassett, I find, was strongly motivated to grant the general pay increase of July 20, and to begin performance evaluations for everyone, with merit pay raises as indicated, for the purpose of undermining the Union's support should (1) the Union win the election and bargaining ensue, or (2) a second election be directed. Even assuming the August layoffs were not unlawfully motivated (NLRB Region 12 dismissed that charge), pay raises were not required. And even if they did make good business sense when Bassett finally got around to preparing a cost reduction plan, it was his mid-May eagerness to grant pay raises immediately which gives him away. That eagerness, prompted, I find, by the Union's election petition, was restrained only by his attorney's advice to hold off until after the election.

Before the Union filed its election petition, where was Bassett's concern over the unlucky employees whose performance evaluations (with their potential for merit pay increases) he, by his own admission (21:3818), had delayed for "several months"?

Before the Union filed its election petition, where was Bassett's concern over stanching the turnover hemorrhage?

The answer to both questions, of course, is that there was no concern. Not until the Union petitioned for an election did Bassett acquire concern—an immediate concern. Contrary to Bassett's expressions, however, I find that the motivation for his concern was not the simple business desires of getting right with corporate policy and reducing employee turnover (even though those desires no doubt became reasons), but a strong urge to undermine the Union's support. Indeed, admitting (21:3816, 3818; 22:3936) that both his discussion (with Human Resource Director Tennant) and his decision to implement the dual pay raise plan (one general, the second merit as indicated by performance evaluations) came during that first week after the Union's election petition was filed, Bassett would have implemented his twofold decision (as soon as a wage survey could be done) immediately but for counsel's advice (21:3820) to wait until after the election (although the wage survey would, and did, proceed.)

I find that *LRM Packaging,* supra at 829 relied on by PDI, controls here, but that it compels a result supporting the Government. There, 308 NLRB at 829, the Board, agreeing with Judge D. Barry Morris, found that the granting of a wage increase, when the union's objections to the election were pending, was lawful. This ruling was based on two findings. First, the pay raise was consistent with past practice. Second, Judge Morris found no unlawful motive. As to the latter, and quoting Board law, the judge wrote (308 NLRB at 834):

> The test is whether, based on the circumstances of each case, the granting of increased wages and benefits is

> calculated to impinge upon the employees' freedom of choice in an upcoming scheduled election or an election which might be directed in the future.

Applying *LRM Packaging* here, I find that PDI, through Division President Peter Bassett, failed to satisfy either ground. As to past practice, the Government proved (largely by Bassett's own admissions) that the pay raises, both decisions and implementations, were inconsistent with past practice. (Past practice had been to disregard corporate policy.) Respecting the second ground, the General Counsel proved that Bassett's motive, unlike the motive of the owner in *LRM Packaging,* was calculated to influence the employees' freedom of choice — so as to favor PDI and to undermine the Union's support.

Similarly, in *Springfield Jewish Nursing Home,* 292 NLRB 1266 (1989), the other case relied on by PDI, past practice favored the employer (who conducted and acted on periodic wage surveys), and the Board found that the motive for individual pay adjustments for certain nurses (nonbargaining unit employees), granted during an organizing campaign of unit employees, was for the legitimate purpose of retaining the nurses. The mirror image of *Springfield* matches the legal principles outlined in *LRM Packaging.*

Accordingly, the decision for and the implementation of the wage increases here (the 25-cent general wage increase and the performance evaluations, with merit increases as indicated) were unlawfully motivated. The unlawful motivation, a plan to influence the employees' freedom of choice, is shown by the fact that the raises were:(1) inconsistent with past practice; (2) improperly timed because based on discussions and decisions held and made immediately after the Union filed its petition for an election. Respecting the latter point, and, contrary to the testimony of Division President Bassett, whom I disbelieve on this allegation, I find that the raises were granted for the purpose and goal of undermining the Union. The undermining goal was to persuade employees that they did not need a union should a second election be directed, and, should the Union win and bargaining ensue, to severely weaken the Union's strength at the bargaining table by reducing employee support.

For these reasons, and on the entire record, I find, as alleged by complaint paragraph 14, that PDI violated Section 8(a)(3) and (1) of the Act by the wage increases which it granted during July-September 1994. [10]

4. Vivian Fortin

a. Introduction

PDI's discrimination against Vivian Fortin, the complaint alleges, began about June 2. "About June 2 and 24, 1994," complaint paragraph 13 alleges, PDI warned Fortin "and restricted her movement in PDI's Miami facility." PDI admits warning Fortin, but denies restricting her movements.

Complaint paragraph 15 alleges that, about August 1994, PDI, through Office Manager Luisa Pacheco, issued Fortin "an unfavorable employee evaluation." PDI admits.

Finally, complaint paragraph 16 alleges that, about October 27, 1994, PDI, through Vice President Mark Noble, "laid off employee Vivian Fortin." PDI admits.

PDI denies the further allegation that it discriminated against Fortin because of her Union activities.

b. Credibility resolved

Several witnesses testified concerning these Fortin allegations. In addition to reasons either of timing, logic, departure from past practice, or plausibility generally, I deem Fortin to have testified with a more persuasive demeanor than the management witnesses opposing her. The disparity in demeanor was particularly distinct as to Office Manager Pacheco, (former) Operations Director Jenkins, and Fleet Supervisor Williamson, but also included Peter Bassett. Although Bassett was the most articulate of all the some 30 witnesses who testified, the demeanor factor favors Fortin. The level of articulacy alone does not control respecting demeanor.

Moreover, a greater number of witnesses on one side of an issue is not controlling. It is the weight of the credible evidence, not the numerical superiority of witnesses, which is controlling. *Sahara Coal Co. v. Fitts,* 39 F.3d 781, 782–783 (7th Cir. 1994); *Riley-Beaird,* 259 NLRB 1339, 1367 fn. 115 (1982.) The rationale of the two cited cases would also apply to an argument that witness "A" should be disbelieved when he or she is opposed by different (but single) witnesses on separate incidents.

In resolving credibility in favor of Vivian Fortin, who testified with apparent sincerity, against her opposing witnesses, including the articulate Peter Bassett, I am reminded of the description of demeanor which Justice Henry Lamm delivered nearly 90 years ago. Writing for the Missouri Supreme Court, Justice Lamm rendered a description of unequaled perception and eloquence: [11]

> We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the beat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

[10] Although complaint 14 alleges July 1994, I granted the General Counsel's motion to conform respecting such matters as dates. (17:2648.)

[11] *Creamer v. Bivert,* 214 Mo. 473, 113 S.W. 1118, 1120–1121 (1908.)

c. Material events before June 1, 1994

(1) Fortin's productivity

Hired by PDI in 1986, Fortin worked at several jobs in customer service, including telephone room order taker, parts counter, inventory, warehouse work, catalog room, building engine kits, and parts look-ups, all before March 1994. (2:218–221, Pacheco; 8:1315–1316, Fortin.) In 1993 and early 1994, Fortin worked in the telephone room taking orders and looking up parts until 11 a.m., at which point she did catalog work. Catalog work includes going to the warehouse to place catalogs in the bins of customers. (8:1316–1317; 9:1485–1487.) Contrary to the suggestion of Jack Jenkins (18:2996), the terms of "order taker" and "customer service," as Fortin explains, are not synonymous, for an order taker simply takes orders, whereas someone working as customer service "looks up parts, locates and matches parts." (9:1485.) Only Fortin and two other employees in the phone room did look-ups. (9:1485.) Bassett acknowledges that Fortin had a reputation for being very good at look-ups, with customers calling for her by name. "She's very skilled." (20:3538; 22:3906.) [He is equally complimentary about her cheerful willingness to do whatever assisting work needed to be done. (20:3562; 23:3994.)]

Jenkins became Fortin's second level supervisor when he was promoted from Credit Manager to Operations Director in January 1994. (18:2841, 2988.) Jenkins remembers Fortin as being, as of May 1994, a "valued" employee. (18:2988.) Although Jenkins initially balked, during the Union's cross examination, at describing Fortin as an "exemplary" employee as of May (18:2988), when confronted with his pretrial affidavit, Jenkins conceded that he had so told the Board agent, testifying at trial that such a description was merely his "personal opinion." (18:2991.) When asked, regarding the period of January 1994 through May 1994, whether he knew of any problems concerning either the attitude, quality, or quantity of Fortin's work, Jenkins answered, "No, sir." (18:2990.)

But according to Pacheco in her initial testimony as a witness called under FRE 611(c), at some point before Fortin's August 1994 performance evaluation, Pacheco did alert Jenkins to a problem she was having with Fortin. Jenkins did not suggest a warning, and Pacheco did not think of that either. Indeed, according to Pacheco, Jenkins told Pacheco to talk to Fortin again. Pacheco failed to do so because "I didn't think of it." (2:183, 227, 231–232.) Fortin's (supposed) problem was low productivity which, in Pacheco's view, was caused by Fortin's leaving her desk too often. Pacheco first noticed the problem about November 1993, and she spoke with Fortin about it then. Twice thereafter, running into about January 1994, Pacheco again spoke with Fortin. Although Fortin's productivity stabilized at a very low level, it never improved. On each of these three occasions, Pacheco told Fortin that she needed to be at her desk, and she asked if Fortin needed any help from her. Fortin would say that she had gone to the warehouse for parts. Pacheco told her to call the warehouse manager and get someone to bring her the parts, for Pacheco needed Fortin at her desk answering the telephone. (2:196, 201, 203, 225, 250, 299–306, 313–315.)

Pacheco did not document any of this for Fortin's personnel file because, she testified, she did not place Fortin on probation. (2:236–237.) Pacheco asserts that, as a matter of routine, she discarded the production records within a month following the August 1994 evaluations, or about September 1994. (2:187–190, 311–312.) Fortin denies being told before her August 1994 performance evaluation that her productivity was low, and she denies having any conversations with Pacheco in which Pacheco told her that the number of her telephone calls was low and that Fortin should not be going to the warehouse. (8:1315, 1371–1372.) Postponing, for the moment, any discussion of events beginning June 1, it is clear, and I find, that there were no such conversations before June 1. Certainly Jenkins would not have told Pacheco after June 1 (in light of the warnings he issued her, as will be discussed) to simply talk with Fortin again. And it is not plausible that both Bassett and Jenkins held Fortin in high regard as of May 1994 if in the previous months Pacheco had been holding counseling sessions with Fortin, with Fortin's productivity supposedly at a very low level.

Pacheco's whole story about Fortin's low productivity, and their supposed conversations on three occasions, is inconsistent with everything, even the testimony of Jenkins and Bassett. Indeed, Bassett freely acknowledges that, almost immediately after Fortin took over the Metro Dade account about March, sales increased substantially. (20:3566; 23:4004.) Crediting Fortin, and disbelieving both Pacheco and Jenkins that they had spoken to her about her productivity, I find that nothing was said. I further find that nothing was said because, contrary to the testimony of Pacheco, in particular, Fortin's productivity had not dropped at any time before June 1. Indeed, crediting Fortin, I find that, by early May 1994, both Pacheco and Jenkins, and salesman Ortega as well, had told Fortin that she was doing a good job. (9:1487–1488.)

(2) Bassett reestablishes the Metro Dade account

A description of the Metro Dade account (MDA or Metro Dade) is an important part of the background. MDA consists of about two dozen governmental customers in the metropolitan Dade County area. The business is selling automotive parts to these governmental units for their some 17 garages that service the various motor vehicles such as police cars, fire trucks, buses, maintenance trucks, and the like. (2:155–156, 224; 8:1319, 1328; 20:3532.)

Before 1992, a competitor of PDI apparently held the Metro Dade account. Sometime in 1992 Bassett decided to try and capture MDA. Based on a suggestion from Robert Ortega, his outside salesman who had been calling on the units, Bassett hired Sherilynn (Bassett could not recall her last name) from a competitor in late 1992 and created, for her, a separate and exclusive (not integrated into the normal customer service function) customer service position handling only MDA.

Because Sherilynn had been calling on the accounts much as an outside salesperson, Bassett had her continue that practice in order to capitalize on her personal contact with the customers. During Sherilynn's tenure at PDI, monthly sales to MDA reached the $55,000 level. After a year of so, Sherilynn departed Parts Depot, Inc. (20:3533–3535.)

Instead of assigning, or hiring a successor to Sherilynn, and continuing with the position as created in late 1992, Bassett tried to go the cheaper route and reduce costs. He therefore assigned MDA to Pacheco's regular customer service telephone room. (20:3535–3536.) Although Bassett testified that Virginia Randle is the person there who wound up handling MDA, along with her other customer service calls (20:3535), Pacheco disputes that, and asserts that it was Charlene (last name not recalled) who did the work, apparently for not more than a short time (2:219–220, 257.)

Regardless of whoever the second person was, the cheaper way "didn't work" and Bassett got "burned." (20:3536.) MDA required "specialized services" and "more services" than the cheaper way provided. (20:3536.) Although the monthly figure is not given for what level sales dropped to, it is clear that the figure had fallen so low from all the complaints about the lack of service that, about February or March 1994, Bassett decided he would have to reestablish Sherilynn's old position. Without considering any other employee, and choosing Fortin because of her excellent customer service skills, Bassett offered the job to Fortin, who accepted. (8:1317, Fortin; 20:3536-3538, 3565; 22:3906, Bassett.) As Fortin credibly describes, both Office Manager Pacheco and then Operations Director Jenkins (Fortin's second level supervisor, and the person to whom Pacheco reported) expressed their confidence that Fortin could do the work. Jenkins said he wanted Fortin to bring up the sales on the Metro Dade account. (8:1317–1318.)

Bassett testified that he modified the reestablished position in two respects. First, Fortin would not make outside sales calls to the customers. There was no need to do so, Bassett testified, because Fortin, unlike Sherilynn, had not been calling on the customers, and Robert Ortega had developed a good rapport with MDA. (20:3539.) Second, in addition to her MDA work, Fortin, from the office she would share with Eddie Leeds, also would handle some look-ups for other customers in addition to her MDA work. (20:3540, 3564; 22:3908.) She would help Leeds, but Leeds would not help her because of the exclusivity accorded MDA. (22:3907.)

The exclusivity aspect describes part of the effort Bassett made to recapture the Metro Dade market. Thus, he designated a specific person (Fortin) to be PDI's exclusive customer service representative for MDA. (20:3538; 22:3914.) And in order to match the service offered by a competitor, Bassett installed a separate telephone number for MDA to call for reaching Fortin. (20:3540; 22:3907–3908; 23:4003–4005.) Fortin also had a voice mail associated with the special telephone number. (2:203; 8:1330; 19:3267; 22:3908.) Finally, a special express van was designated for exclusive delivery of parts to the Metro Dade garages. (22:3914–3915.) As he testified, Bassett considered the Metro Dade account an important account. (22:3910.) To emphasize this, Bassett told Fortin that he wanted her to provide a "high quality" level of service for MDA. (23:3998–3999.)

As already noted, by early May both Pacheco and Jenkins, plus salesman Ortega, had told Fortin that she was doing a good job on MDA. And the sales figures support Fortin's testimony. Thus, sales jumped almost immediately under Fortin. (20:3566; 23:4004, Bassett.) For May (at PDI, the sales month ends about the 25th, 20:3566-3577), sales had reached about $33,000. (22:3919.) The same figure was reached for the month ending June 25. (20:3566–3577.) While sales under Fortin never reached the great figure of the $50,000 a month range achieved under Sherilynn, Bassett was pleased with Fortin's figures of close to $35,000. (20:3566.)

d. Employer knowledge

Fortin signed her union card (GCX 12-20) on May 10, 1994 at her desk. (8:1330, 1372, 1374; 9:1388, 1511.) Although Fortin distributed cards to several employees during the days that followed, there is no evidence that management was aware of her activity, or that she had signed a card. Indeed, neither her name nor her signature appears on the mid-May letter (GCX 2) from some of the principal supporters to Bassett, in which letter they reminded Bassett of their right to organize. Thus, as I summarized earlier, when Bassett interrogated Fortin in his office on May 12 about any union rumors she had heard, and what he could do to stop the Union, Bassett was unaware of Fortin's activities on behalf of the Union. Bassett had called Fortin into his office not only because he knew her and conversed well with her (22:3878; 23:4015–4016), but because he "trusted" her (20:3524.)

In preparation for the NLRB hearing scheduled for Wednesday, June 1, the Union subpenaed, among others, Vivian Fortin. Fortin's subpena (GCX 21) reflects on its face that it was issued at the request of the Union's regional counsel. On May 31 Fortin presented the subpena to Operations Director Jenkins. (8:1323–1334.) Bassett acknowledges that Jenkins, before the scheduled hearing, told him about Fortin's subpena. (23:3955.) Although Fortin was not required to obtain permission to honor her subpena, she exercised courtesy and prudence in notifying her employer the day before she was to attend. See *Yenkin-Majestic Paint Corp.,* 321 NLRB 387 and 387 fn. 3 (1996.)

Pursuant to the subpena, Fortin appeared at the June 1 scheduled hearing. There was no testimony, however, because an election agreement was reached. (GCX 17.) On June 1, following the agreement for an election, Fortin was interviewed by Ted Reed of the Miami Herald. (8:1335.) Fortin recalls that Reed's article (GCX 22), in which she is the only employee quoted by name (as saying that the workers "want to better ourselves"), appeared within a day or two. (8:1336.) Although Bassett does not recall when the article appeared, he concedes that he read it the day it was published. (23:3954, 4034–4035.) As the article, as Fortin testified, appeared within a day or two, and as the article itself refers to "Wednesday," as does a nearby article about "Dow moves slightly forward," I find that the article appeared in the Thursday, June 2, 1994, edition of the Miami Herald.

PDI argues (Brief at 60) that the mere fact the Union subpenaed Fortin to testify at the scheduled representation hearing does not show knowledge by PDI that Fortin supported the Union. Although the Union's subpena to Fortin does not prove conclusively that Fortin was a supporter of the Union, common experience demonstrates that a rebuttable presumption arises that Fortin was given a subpena because she already had been cooperating with the Union. In the instant case, PDI made no effort to rebut this presumption. Accordingly, I find that, as of

Tuesday, May 31, 1994, PDI, including Division President Peter Bassett, knew, or at least strongly suspected, that Vivian Fortin supported the Union.

e. The June 1994 warnings

(1) June 1, 1994—subpenaed attendance

Before June 1994, Fortin had never received as much as an oral warning. (8:1359.) Indeed, Office Manager Pacheco testified that she has never issued a warning, oral or written, and that she has relied on oral counselings which were not warnings. (2:180, 298.) Fortin's unblemished record, and her good relations with management, abruptly changed on June 1. On that day Operations Manager Jenkins gave Fortin a "verbal warning," which he documented by memo of June 1 to Fortin's personnel file. Although the complaint does not attack this warning, PDI offered the file memo, and it was received over objection, for the limited purpose of showing PDI's motive as to subsequent events which are alleged as unlawful. (18:2902–2906.) The text of Jenkins' documented verbal warning to Fortin reads (RX 38):

> On this date Vivian had, as other PDI employees did, a subpoena requiring her appearance at a court hearing. The hearing was at 1:00 p.m. and the hearing was consequently canceled. Vivian however felt compelled to attend and in that her involvement would take no more than a few minutes as we [were] led to believe we did not object to her attendance.
>
> Vivian punched out at 12:00 noon and returned at 3:50 p.m. She was absent for a half day with no coverage available for her position. She is the Metro Dade clerk and specific duties are required for order completion. She was truly missed and without a phone call we had no idea of her return time.
>
> I counseled with Vivian regarding the matter and her response was that she was delayed due to the fact that she drove there with other PDI employees and that she was dependent on them for a ride back to work. She stated that they met with reporters and then went to a late lunch. She continued to state that she was sorry for the delay and that this would not happen again. Vivian understands after this session the reason for my concern and that this is to be considered a verbal warning. If matters of this nature occur again stricter actions will result which will include written warnings and possible disciplinary actions.

Nothing in the memo, or the record, justifies a warning to Fortin over any alleged delay in returning from the scheduled hearing. There is no evidence supporting the memo's statement that Fortin felt "compelled" to attend and that her involvement would take no more than "a few minutes as we [were] led to believe" First, the memo (RX 38) was not received for the truth of the matter. Second, it would not be admissible (for the truth) as an exception to the hearsay rule for business records because, even if memos to personnel files in ordinary business times may satisfy the standard, the "circumstances of preparation" of this memo indicate a "lack of trustworthiness." FRE 803(6.) In the words of a quotation in the Advisory Committee's Note to Exception (6), Jenkins' statement is "dripping with motivations to misrepresent." (Federal Rules of Evidence, 1996–1997 Edition, 137 at 139, West Pub. Co., 1996.) And see *Pierce v. Atchison Topeka and Santa Fe Ry. Co.,* 110 F.3d 431, 443–444 (7th Cir. 1997) (not error under FRE 803(6) for trial judge to exclude memo to employee's personnel file from Santa Fe official in age discrimination case.)

For example, it was Jenkins who acknowledged to Fortin that the subpena meant she had to attend. (8:1334, Fortin.) Nor is there anything in Fortin's description (the only record evidence on the matter) of their May 31 conversation to support the memo's assertion her attendance would be for no more than "a few minutes." No reasonable person in America would conclude that anything associated with attending a court or legal proceeding as a witness could be completed in just "a few minutes." Apparently, as the last clause of the first paragraph suggests, had Jenkins known that Fortin's absence would have been for more than a few minutes, he would have objected to her attendance. That alone shows his unlawful motivation—Fortin could exercise her statutory rights only so long as it required an absence of no more than "a few minutes." That is ridiculous. As Jenkins would have done had Fortin been absent for several days with the flu, or an even more serious medical condition, he would have made other arrangements for someone to handle her work (just as was done after she was terminated.)

The memo's final paragraph shows Fortin's response. On this, Jenkins testified that such was the response she gave. (18:2906.) His testimony is independent evidence of her response. Thus, Jenkins admits that Fortin told him on her return that (1) she was dependent on the other employees for transportation; (2) they met with reporters [as there is nothing about the time, it appears, and I find, that it was the fact of meeting with reporters on behalf of the Union, not the time spent, to which Jenkins objected]; and (3) took a late lunch [when a reasonable lunch period is subtracted, it is seen that the total time Fortin was absent from work was barely 3 hours – a clearly reasonable time under the statute and the circumstances].

As Jenkins continues in his memo, after expressing his "concern" to Fortin, a concern I find to have been a total fabrication, he does not stop at just issuing a "verbal" warning. Instead, I find, he again shows his true motivation of laying a paper foundation for getting rid of Fortin as soon as possible. This he does by threatening even stricter sanctions including "written warnings and possible disciplinary actions." Thus, this was not a friendly counseling for someone whom Jenkins, during May (that is, just one day earlier), considered not only a "valued" employee (18:2988), but an "exemplary" one (18:2990–2991.) Unlike the hypocrisy displayed by Jenkins, the sincerity of Fortin appears in her expressions of regret, born, I find, from fear for her job and engendered by the heavy-handed threats by Operations Director Jenkins.

Finally, there is the demeanor factor. Jenkins' demeanor was very unfavorable. He testified as a person who views the Union and its supporters as enemies to be eliminated. Jenkins' June 1 memo indeed reveals his motive, but a far different motive from that for which PDI offered the memo. I find that it shows that Jenkins was driven by the unlawful motivation to seize on Fortin's short and protected absence to begin the paper

foundation for eliminating her from PDI's payroll because of her status, in his view, as a union enemy. Had the Union not been on the scene, and Fortin simply asked for some time off to handle personal business, Jenkins, I find, would not have given her absence a second thought.

(2) June 2, 1997—the loading dock incident

The day following Fortin's appearance for the scheduled June 1 hearing on the Union's election petition, and the day following Fortin's first-ever warning of any kind, Jenkins again "verbally" warned Fortin. There is no documentation in evidence for this incident, which is referred to as the "loading dock" warning.

On this occasion, Fortin was returning to her office from depositing Metro Dade invoices in bags that are put on totes. The parties stipulated that "totes" are containers in which parts are placed. (21:3678.) Totes, which ride on routes on the warehouse conveyor system, carry the parts to the parts counter or to the trucks. (9:1504; 20:3506–3508; 22:3921.) As Fortin started back, Fleet Supervisor Williamson emerged from the stacks and his course brought him alongside Fortin. As they proceeded, Fortin observed three warehouse employees, one of whom was Joe Castro, grouped and talking, in Spanish, about the Union. In Spanish, apparently, Fortin told the group that it was not fair to discuss the Union on PDI's time and that they should return to work. Castro said he agreed, and the three returned to their work. Williamson told Fortin, "Good. That was good." (8:1348, 1354–1356; 9:1499–1507.) Castro did not address this incident when he later testified.

Williamson reports a strange twist to the incident. According to Williamson, Fortin came from the office to the loading dock when he was "launching" (dispatching) the trucks, a very busy time. Approaching Williamson, Fortin told him that Peter Bassett had told her "to come out and talk to her people." Fortin did not explain. Instead of responding, Williamson went to report the matter to Warehouse Manager Leo Belaunzaran. As Williamson departed, he observed that Fortin was conversing with Ronald Casco and Jose Castro. Before Fortin arrived, Casco had been checking as Castro loaded the trucks. There were two to three others there that Fortin spoke to, but Williamson is unable to recall their names. They were speaking in Spanish. Williamson reported the matter to Belaunzaran who replied that he would take care of it or look into it. When Williamson returned to the loading area, Fortin was no longer there. The other employees had resumed working. Williamson testified that Jenkins was not in the area when the incident occurred. (20:3389–3395, 3447–3448.)

Williamson testified with an unpersuasive demeanor, and I do not credit him. Moreover, Williamson's story about Fortin's saying that Bassett told her to come talk to "her people" is bizarre and not plausible. Bassett had learned on May 31 that Fortin was going to be a witness for the Union. I have found that, through such knowledge, Bassett also concluded, or strongly suspected, that Fortin supported the Union. Thus, it makes no sense at all that Bassett would have commissioned Fortin to go into the warehouse to talk to "her people." Moreover, I note that Bassett, when he later testified, never confirmed or denied this account of Williamson's. The lack of confirmation diminishes the overall credibility of Williamson's story. A denial would mean that Fortin would have lied to Williamson about something the division president assertedly had told her—a strange thing for a rank and file employee to do. I do not believe Williamson.

Jenkins has a third version. According to Jenkins, on this occasion, or some similar occasion, he observed Fortin, on the shipping line (another name for the loading area), talking to Jean Claude Demosthene and several other employees, with Fleet Supervisor Williamson's being a witness. Jenkins went over and directed everyone to return to work. Although Jenkins does not recall whether he spoke to any of the other employees, he recalls that he spoke with Fortin about the matter. Initially Jenkins was sure he wrote some warnings over this. (18:2866.) Later, on cross examination, Jenkins could not recall having issued any warnings. (18:2952.) Jenkins recalls that, at the time he addressed the group, Fortin said she was sorry and would return to work. He did not inquire as to who had initiated the conversation. (18:2865–2866, 2948–2955, 2963.)

According to Jenkins, he reported the matter to Bassett, and Bassett expressed irritation because, he said, he had just had a "session" with Fortin a few days earlier. (18:2867, 2950, 2952–2955.) During his own testimony, Bassett does not mention any "session" with Fortin in which he supposedly criticized Fortin in some fashion. And as I have noted, Williamson denies (20:3444) that Jenkins was in the area when he observed Fortin speaking to employees, and he further recalls no similar incident involving Fortin and Jenkins (20:3444–3445.)

As earlier noted, I find Jenkins to be a totally unreliable witness. I find that his version, to the extent it is based at all on an actual event, is a garbled description of the incident which Fortin describes.

Before resuming with the balance of Fortin's account (the part involving the warning and restriction), I should address two points. PDI argues (Brief at 62–63) that I should draw an adverse inference from Castro's failure to confirm Fortin's account. I did not draw an adverse inference from Bassett's failure to support Jenkins' account, but simply noted that such absence affects the overall credibility of Jenkins' version. That is different from finding that Bassett, had he been asked, would have denied the assertion. Bassett possibly would have testified that he could not remember. Nor do I infer that Warehouse Manager Belaunzaran, had he addressed the matter, would have denied that Williamson reported the Fortin matter to him and that he said he would look into it. I weigh the absence of that corroboration, however. Similarly, I decline to draw an adverse inference from Castro's failure to confirm. It could well be that Castro, had he been asked, would have testified that he could not recall. Nevertheless, I have weighed the absence of that corroborating testimony in evaluating the overall credibility of Fortin's description of the incident. Even so, I have found Fortin's account credible.

A second point made by PDI (Brief at 61) is that, as the record reflects. Williamson speaks and understands very little Spanish. That being so, it is not credible that Williamson would have remarked to Fortin, "Good. That was good." PDI's argument is misplaced. Whether Williamson understood Fortin's Spanish remarks to Castro and the others is immaterial.

The material point is that she spoke to them and, with Castro acknowledging, they returned to work. It was the fact that, whatever she had said, Fortin had authoritatively accomplished the group's return to work that had impressed Fleet Supervisor Williamson. That fact, I find, is what prompted Williamson's expression of approval—"Good. That was good."

Turn now to the balance of Fortin's account. About 15 minutes after the incident, Fortin was called to Jenkins' office. Present were Jenkins, Human Resource Director Robert Tennant, and Fortin. Jenkins said he was giving Fortin a "verbal" warning because she had been on the loading dock engaged in idle conversation. Fortin replied that she merely had told the men to quit talking and to resume working, and that if he did not believe her he could ask Fleet Supervisor Williamson.

Without addressing Fortin's statement or reference to Williamson, Jenkins told Fortin that, from that moment on, she was not allowed to go to the warehouse, that she was to go no further than the parts counter to take care of her Metro Dade accounts. Moreover, she was not to talk with anyone unless it was job related, nor was she to go anywhere besides her office, the restroom, the parts counter, or the lunch room. Fortin told Jenkins that his order would interfere with her job performance because she had to go to the warehouse and pull a lot of parts from the warehouse for her customers. Jenkins replied that if she needed anything from the warehouse she was to call Hector Ortiz or Angel Gonzalez. Fortin said okay. (8:1348–1357.)

As Fortin was leaving work that day, she saw Williamson and asked him if he had talked to Jenkins. Williamson merely replied, "Yeah, yeah, yeah, yeah, yeah." Fortin said nothing. (8:1357–1358.) Before June 1994, Fortin credibly testified, she had never been restricted to certain areas or told she could not talk (about non work matters) to other employees at PDI. Before June 1994, Fortin had never been told that, if she needed something from the warehouse, she was to call a supervisor there. A few days after this loading-dock incident, as Fortin was returning to her office from the restroom, Jenkins literally ran in from the warehouse and, almost out of breath and red in the face, asked where she had been. "The ladies room," she replied. "Oh," Jenkins said, and he walked off toward his office. (8:1358–1359.) If Jenkins documented his "verbal" warning to Fortin for the loading dock incident, no party introduced a copy into the record.

Regarding this occasion (which he actually places on June 7 because of a reference to that date in the last warning to be discussed), Jenkins claims that he personally came upon a group of employees, including Fortin and Jean Claude Demosthene, talking on the shipping line (the loading dock area.) He told the employees to return to their work. Jenkins' asserts that he reported the matter to Bassett, who expressed irritation over the incident because Bassett had "just had a session with" Fortin. [Bassett did not address this assertion when he later testified.] Jenkins initially testified that he had written some warnings for this incident, including one to Fortin. (18:2865–2867.) On cross examination, Jenkins admits that he does not recall whether he "wrote up" Fortin or anyone else over the incident. (18:2950–2952.)

Also, on cross examination, Jenkins adds Williamson as a witness. (18:2948.) Jenkins recalls that, at the incident, Fortin said she was sorry and would return to work. (18:2952.) Of the employee involved, Jerez recalls speaking, afterwards, only with Fortin. (18:2849.) He does not recall her response. (18:2867.) Jenkins does not recall that Fortin asked him to speak with Williamson about the matter. (18:2955.) I do not believe Jenkins in any respect.

According to both Jenkins (18:2843, 2847) and Bassett (20:3541, 2545, 3551; 23:3978), the job duties of Fortin did not include any trips to the inside of the warehouse (where the "pullers" worked and the parts are stacked.) Note carefully, however, that Bassett testified, regarding Fortin's Metro Dade job, "not as I had structured it." (20:3541, 3551; 23:3978.) That choice of words, I find, was no accident. As I have noted, Bassett is a very articulate person. His mind is nimble, and he handles himself well under pressure and before an audience. When Bassett refers to the Metro Dade job as "structured," he is making a verbal distinction (as a reflection of a mental distinction) between the job's alleged design and the way Fortin worked MDA.

First, Bassett admits that he did not know whether Fortin delivered invoices (orders) to the warehouse personnel for action because he did not follow here around. (23:3977.) In fact, Fortin did. (8:1319–1320.) Bassett at first testified that the invoices were printed in the dispatch office (different from Fortin's), placed by another person into a pneumatic table, and thereby sent to the warehouse without Fortin's ever having to leave her office. (20:3541–3547; 22:3920–3921.) Bassett eventually corrected this, during the Union's cross examination, to acknowledge that the printer was in Fortin's office (23:3975) and to admit (23:3976) that the MDA invoices had to go out the same day they were printed. He then claims that it was the job of warehouse office clerk Emily Woods to put the paperwork in the proper envelope for delivery to the customer. (20:3502; 23:3977.)

Bassett then denies that Fortin frequently handled large MDA orders, and asserts that Fortin did not, to his knowledge, take invoices to the warehouse supervisors. (23:3978.) Bassett admits that he never told Fortin how the MDA invoices were to get from her office, where they were printed, to the MDA accounts, admits that he never instructed Jenkins to tell Fortin how it was to be accomplished, and admits that he does not know how she did it because he did not follow her around. (23:3977–3979.)

Contrasted with the unpersuasive, and flawed, outpouring of words by Bassett, Fortin clearly describes how she had to handle the MDA invoices (8:1319–1320):

> A. Okay, they buy differently than a regular customer. They buy in large quantities, and they have to be printed on a special invoice with a printer that I had in my office, and their orders had to be walked out, they weren't just sent out like the regular orders. They had to be walked out to the warehouse, where they were given normally, to Angel or Hector.
>
> Q. Angel Gonzalez?
> A. And Hector Ortiz, or Robbie Williamson.

In answer to another question, Fortin testified that she walked them out. Asked who told her that she had to walk them out, Fortin never answers that anyone did, but states that it was the "normal procedure" for the MDA invoices. Moreover (8:1320):

> They were special accounts, and you didn't just put them out there in the warehouse. They had to be handled, because we had a special truck that left at a special time and everything had to be ready at a certain time. So, everything had to be just so.

Fortin's description is entirely consistent with the commission Division President Peter Bassett had given her back in March—to provide a "high quality" level of service for MDA. When Fortin did so, and, as will be covered in more detail in a moment, as sales rose, Bassett was pleased. He and the rest of management became displeased, I find, only when they learned that Fortin was supporting the Union. This displeasure was manifested in several ways. One way was to restrict her movements, and to warn her, by redefining the nature and geographical reach of her duties. As Fortin predicted to Jenkins at her June 2 second warning, the restrictions would damage her ability to service MDA. As we are about to see, sales began to fall in late June. Bassett lays all the blame on poor service by Fortin. (20:3567–3568; 22:3913–3914.) As complaints began coming in beginning in late June that MDA calls were not being answered or responded to, sales began to decline. "The very nature of the job was providing outstanding service and accessibility on the telephone." Answering calls and making calls to solicit orders "was the very nature of that job, not to do warehouse work." (23:3999–4000.)

Although Bassett asserts that he does not know why the telephone was not being answered (23:4002), his testimony suggests that he believes that the cause, in substantial part, was because of trips she may have been making to the warehouse. Bassett fails to explain why such trips, which apparently helped to increase sales before June, suddenly became such a destructive force in late June. PDI argues (Brief at 66) that it lawfully disciplined Fortin because she engaged in nonwork activities during working time. "Furthermore," PDI continues, the evidence shows that Fortin, during work time, signed her own union card, witnessed the signing of a couple of others, and spoke with another employee in the warehouse about a union card. PDI does not suggest the total working time thereby "wasted" (Brief at 67), or whether this activity helped cause the sales volume to fall, but does contend that Fortin was lawfully disciplined.

In addition to taking orders to the warehouse, Fortin also did some "matching." There is a distinction between "look-up" and "matching." The work of doing a "look-up" is a recognized function in the customer service department. It involves using a catalog or computer to look up a part number for a customer and determining whether the warehouse has the part. Typically, the customer will know the make and model of the vehicle, but not the part number. (9:1986–1987, Fortin; 20:3536–3567; 23:3990, Bassett.) By contrast, "matching" describes the process of taking a part a customer has brought to the warehouse counter, and physically and visually comparing it with parts in stock in order to find a matching part. (20:3548; 23:3981, Bassett.) The dispute here is whether Fortin's work, especially after she took over the Metro Dade account in March 1994, involved any "matching" of parts beyond some isolated occurrence. Fortin asserts that such matching was a daily characteristic (8:1353, 1360; 9:1480–1482), whereas Bassett contends that it would have been, at most, a very rare occurrence. (20:3547–3553; 23:3979–3981.)

Describing how Jenkins' restriction order of June 2 would adversely affect her ability to provide a high quality level of service, Fortin testified that "a lot of times" a Metro Dade or regular customer would bring in a part that needed to be matched. Instead of relying on warehouse personnel who would have to bring up a part three or four times before, by process of elimination, finding the right part, Fortin would herself take the part back and find the match. Asked why she could not accomplish this by calling Hector Ortiz or Angel Gonzalez, as directed by Jenkins, Fortin explained that they would have to go through the three to four item elimination process, and that process consumed a lot of time. When she sent to the warehouse and did the matching on the spot, the extra time was saved. (8:1360–1361; 9:1480.) Moreover, Hector Ortiz did not know how to match parts, Fortin credibly testified. (9:1481.)

Regarding matching, Union counsel asked Bassett whether it was better service for the customer service representative (Fortin) to offer to match the part rather than asking the customer to wait or to call back while she would seek to find the answer. Initially conceding that it would be better service to do the matching (23:3996–3997), Bassett then slides over to the difference in accounts, some being (full) service and others being "EC" (earned credit) accounts which receive price discounts with lesser service. MDA was of the discount variety, Bassett testified. (23:3998.) Bassett testified that he did not tell Fortin to provide only "EC" type service for MDA, and that he did not tell her anything about the type of service she was to give. (23:3998.) To the next question, however, he explains that he did tell Fortin he wanted her to provide service of "high quality" to build up sales. That change, he asserts, in late June when he began receiving complaints from Robert Ortega, the outside salesman. (23:3999.) Bassett then stresses that the very nature of Fortin's job was to provide outstanding service and accessibility on the "telephone," and that this has nothing to do with EC accounts and service accounts because those terms apply to service by warehouse personnel. (23:3999.)

The course of this series of questions and answers bears on Bassett's credibility. Thus, the Union began the series by asking whether it would be better to match than to put the customer off until later. Bassett then, at the very least, implies that matching should not have been done for MDA because Metro Dade is an EC account—an account with discounted service. Moments later, after a confusing exchange about his instructions, or not, on the type of service Fortin was to provide, Bassett blithely states that the type of account is irrelevant to the type of service Fortin was to provide. This quicksilver performance by Bassett does not inspire confidence in his reliability as a witness.

In any event, a disinterested third party, the manager (Carlos A. DeLascagigas) of one of PDI's customers, corroborated Fortin's version about matching when he testified, during the rebuttal stage, that, during 1994 and before, he and his employees would take parts three or four times a month to PDI for Fortin to match. And this was just one of Fortin's customers—one of her "regular" ones, it appears. Fortin testified that, even after she took charge of MDA, she continued to assist her "regular" customers. (8:1329, 1360.)

The bottom line for all of this is that, as of early June 1994, PDI redefined the nature of Fortin's job duties, confined her to specific work and lunch areas (unlike other customer service representatives who could take their lunch to the warehouse, 8:1362, Fortin was restricted by Jenkins to the lunch room), and issued her "verbal" warnings—all in response, I find, to Fortin's betrayal of the "trust" Bassett had in her. That is, Fortin acted contrary to Bassett's belief that she would not be a union supporter.

I find that PDI was unlawfully motivated when it issued her the "verbal" warning of June 2, 1994, and when it, on that date, restricted her to certain areas of the Miami facility. I further find that PDI failed to demonstrate that it would have warned her, and restricted her, even had there been no union activity. PDI on brief points to Fortin's (rather modest) card signing activities as proof that she was wasting working time when she signed her card and witnessed two or three others sign cards. The flimsiness of that argument is obvious. First, these activities occurred during May—a month in which, as Bassett admits (22:3919), MDA sales were relatively high at about $33,000. Thus, by increasing monthly sales to the $33,000 to $35,000 range, Fortin had achieved Bassett's "desired result." (20:3566.)

Second, in May 1994, PDI was not aware of Fortin's union activities, so it could not have relied on them as a basis for any warning on June 2. Indeed, on June 2, Jenkins did not mention any of her union activities. What PDI did, I find, was to decide that it did not want a Union supporter (having just learned on May 31 that she supported the Union)—particularly one who had betrayed Bassett's "trust"—being able to walk out to the warehouse where other unit employees worked. Accordingly, I find that, as alleged, PDI violated Section 8(a)(3) and (1) of the Act when, on June 2, 1994, it issued Fortin a "verbal" warning and confined her to specific areas of the Miami facility. It did this, I find, for the threefold purpose of (1) punishing her for supporting the Union, (2) limiting her opportunities to discuss the Union with other employees, even during her breaks and lunch periods, and (3) deterring others from supporting the Union.

(3) June 2, 1994—the catalog room incident

The only evidence concerning this purported incident comes from Jenkins. Fortin did not address the matter during her case-in-chief testimony (possibly because the incident never happened, or, if it occurred, she was not told to consider the matter a "verbal" warning.) Although Fortin was represented to be a rebuttal witness (24:4195), she reportedly called that she was delayed by a flat tire. (24:4171, 4193.) I held open the record for a short time, to accommodate Fortin and any surrebuttal while the parties addressed the representation portion of the case. (24:4197.) Eventually, as no further word had been received from Fortin, and as a heavy rainstorm had developed, that doubtlessly would complicate travel, I declined the Union's request that we remain longer. (24:4209.) A few minutes later, I closed the hearing. (24:4219.)

According to Jenkins, on June 2, 1994, he recorded a "verbal" warning (RX 39) for Fortin's personnel file after he observed Fortin and two other employees (including Linda Shingles) enjoying coffee (there was a coffee pot in the room), laughter, and good times at Shingles' work station about 2 p.m. in the catalog room. Jenkins told the group to return to work, that it was not break time. Fortin said she was sorry and did not mean to interrupt Shingles' work. Jenkins did not inquire as to who initiated the conversation. Fortin and the other employee left. (18:2858–2862, 2907–2908, 2944–2948, 2963.) Jenkins does not recall whether he issued a warning to either of the others (18:2946), and there is no evidence showing that he did.

The warning form (RX 39) respecting Fortin does not bear Fortin's signature in the space for the employee's signature (there is no evidence that Jenkins presented the form to her or told her that he would document the incident for any purpose.) Over hearsay objections, I declined to receive the document for the truth of the matter asserted in the document (18:2863-2865), but I did receive the document for the limited purpose of Jenkins' motive respecting the written warning yet to be discussed. (18:2904.) Although PDI did not offer the document under the exception for records of regularly conducted activity (the "business" records exception), FRE 803(6), I would not have received it for the truth because, under all the circumstances and events of an ongoing union organizing campaign, and in light of Jenkins' poor demeanor, I would find that the document not to be trustworthy. FRE 803(6); *Pierce v. Atchison Topeka & Santa Fe Railway Co.,* 110 F.3d 431, 443–444 (7th Cir. 1997.)

PDI also mentioned the complaint allegation respecting June 2 as a purpose for the motive offer. As I have found, the date of June 2 specified in complaint paragraph 13 includes the loading dock incident. [The loading dock area is the same area as the shipping line. 20:3390, Williamson.] Although Jenkins would place the loading dock incident on June 7, based (18:2872) on a reference to June 7 in the June 23 written warning to be discussed, I credit Fortin's testimony that the loading dock incident occurred the day after the scheduled June 1 election hearing. (8:1348.) As the motive on a June 2 catalog incident (which Jenkins places at 2 p.m., 18:2945; Fortin fixes the loading dock incident at 11 a.m. on June 2, 8:1348) can bear on the motive for other events, I consider it as to all events.

As Fortin did not address the catalog incident during her direct examination, and was not asked about it on cross examination, and as she did not testify on rebuttal, we do not have her position on the claimed incident. Because I find Jenkins to be particularly unworthy of belief as a witness, I am very reluctant to accept anything which he asserts. I do not do so when a matter is disputed, particularly if the dispute is a direct rebuttal. And if the rebuttal can be inferred, I do not credit Jenkins.

Respecting the catalog room, I note that it was a work area where Fortin would have occasion to visit. Moreover, before

June 1994, PDI had never restricted employees in their conversations with other employees at work. (8:1364, Fortin.) What Fortin apparently means is that PDI does not prohibit limited nonwork conversations during working time, for PDI's 1991 employee handbook rules are either broad enough (no "interference with the performance of other employees"; "…lack of application…"; "Any other conduct . . . "—RX 40 at 37–38), or illegal enough (no "circulation of petitions"; no "distribution of literature not approved by the Company"; and no "solicitation of membership . . . "—RX 40 at 41–42), to prohibit all nonwork conversations if so enforced. Although Jenkins asserts that the coffee pot present that day was not the normal one for the employees in that area (18:2945), he does not suggest that employees should not have been drinking coffee during work time.

To conclude this matter, and in noting that Fortin appears to have been the only person present whose personnel file was stuffed with a "verbal" warning over the incident, I find that Jenkins' real motive (even assuming there was an actual event bearing some similarity to Jenkins' description) was to further punish Fortin for betraying the "trust" which Bassett placed in her (a "trust" that she would be nonunion), and to further paper her personnel file in anticipation of an eventual discharge. Further, I find that PDI has failed to show that it would have issued the warning even in the absence of any union activities. I therefore find that, by documenting the "verbal" warning for Fortin's personnel file, PDI violated Section 8(a)(3) of the Act, as alleged.

(4) June 23, 1997—the Core Department warning

Before Fortin switched to handling MDA, her day began at 7:30 a.m. (8:1316.) Nothing indicates a different starting time for her work on MDA. Ronald Casco, a checker working in the Core Department (the returns area) in June 1994 (20:3512, Bassett) also began work at 7:30 a.m. (20:2384–2385, Williamson.)

About 7 a.m. (7:1074; 8:1278, Casco) to 7:10 a.m. (8:1363, Fortin) the morning of Thursday, June 23, Fortin went to the Core Department and, in a brief conversation of a few seconds, asked Casco if he would give her a ride home that afternoon because her car was being repaired. Casco said yes. No other employees were in the Core Department at the time. On her way to the department, Fortin had passed the office of Chairman Rollance E. "Rollie" Olson, one (RX 40 at 3) of the major owners of PDI, as Olson sat in his office. They exchanged a "Good morning" as Fortin passed. As Fortin turned to leave Casco and start for her office, she saw that Olson had approached and was looking at them. Olson said nothing. (8:1363–1364; 9:1540–1542, 1545.) [When called as PDI's witness on a tangential topic, Casco makes a vague reference to an occasion when Fortin came to his work station, and Olson came by. The question was about work time. (19:3199.) As this testimony was not developed, I rely on the earlier testimony describing a specific incident and giving specific times.]

About 4:30 that afternoon, Fortin testified, she was called to Jenkins' office where, in the presence of Human Resources Director Robert Tennant, she was given a written warning (GCX 24) for disrupting the work of (Casco) by engaging in "idle" conversation while both employees, it being 7:30 a.m., were on work time. (8:1365; GCX 24.) The warning form (GCX 24), completed by Jenkins (and also signed by Tennant as a witness), after stating that it was Olson who had observed Fortin at "7:30 AM" on June 22 [12] engaging in "idle" conversation while both employees were on work time, asserts that Fortin has had two prior "verbal" warnings, one on June 2 and the other on June 7, for the "same actions."

For expected improvement and plan for improvement, Jenkins wrote (GCX 24):

> Vivian has been warned not to disturb other employees while they or she is on work time. She is expected to stay at her assigned station and promote sales to Metro accts. & serve as back up to Eddie Leeds with customer look up calls.
>
> Vivian is expected to refrain from disruptive actions with other "on the clock employees" and wandering into areas of the complex which she has no business to be in.

For future action the document warns that any repeat of "this disruptive behavior will result in termination of employment." At the interview Jenkins explained that termination would be "on the spot." (8:1365.)

After Jenkins had told Fortin the basis for the warning, Tennant handed Fortin the document and asked her to sign it. Fortin began reading the form. Reaching the reference to two previous verbal warnings, one on June 2 and one on June 7, and being unaware of any June 7 warning, she asked Jenkins about the June 7 reference. Jenkins merely lifted his hands and said, "Oh, well."

Laying the document on Jenkins' desk, Fortin announced that she would not sign it. She told the men that it was not fair, that she had not engaged in any idle conversation, that she had just asked for a ride to pick up her car. (8:1365–1369.) Fortin did not write this reason for not signing, or write any comment, in the employee comment section of the warning form. Jenkins recalls that Fortin had no response. (18:2873, 2958.) He also has no recollection that she commented as described. (18:2959.) Unlike Jenkins, Fortin testified convincingly, and I credit her version that she commented, as described, even though she wrote nothing in the comment section. There is no dispute that she refused to sign. It is consistent with that refusal that she also would not dignify the document by inscribing a comment when she was not going to sign it.

Jenkins admits he had prepared the document before the warning interview, and that his intention, before the interview, was to give the warning. (18:2957, 2959.) Jenkins does not recall whether he asked Fortin why she had gone to the Core Department. (18:2958–2959.) I find that the warning interview was a mere formality, not an investigative interview before decision. The decision had been made, and the warning prepared. I find that Jenkins did not ask for Fortin's version, al-

[12] Jenkins apparently transposed the date in the text. No party contends that the incident happened a day before the warning was given. Fortin clearly asserts that it all happened the same day. The complaint allegation of June 24 is in error.

though Fortin did have the opportunity to write her comments on the form.

Owner Olson did not testify. Neither did Tennant. Bassett asserts that Tennant left PDI sometime in 1995. (21:3815; 22:3831.)

PDI argues (Brief at 64) that, as Casco testified that he took Fortin to the Union's office after work (8:1279), this proves that Fortin came to talk with Casco about union matters, not about any ride. This argument conveniently overlooks (1) Casco gave her a ride, and (2) Casco's testimony that the plan changed after Fortin got the warning that afternoon and that is why Casco took her to the Union's office. (8:1279.)

From the evidence that there are telephones in both Fortin's office and in the Core Department in June 1994, and that Fortin could have called Casco (18:3000, Jenkins), PDI argues (Brief at 64) that there was no need for Fortin to have gone to the Core Department. That brings us to consider the time of the incident. Jenkins asserts that he wrote the warning document based on the account given to him by Olson. (18:2868, 2956.) The shift did not begin for either Fortin or Casco until 7:30 a.m. That fact, I find, presented a problem to PDI, for, crediting Fortin and Casco, I find that Fortin and Casco had arrived on the premises before the 7:30 a.m. start of their shift, and that Fortin's brief visit to Casco occurred at no later than 7:10 a.m. (PDI did not identify or offer in evidence the time cards of Fortin and Casco to rebut their testimony of when they arrived, or at least clock in.)

Noting that Jenkins "possibly" consulted with Bassett over the warning (18:2957), and aware that Chairman Olson was intimately involved in the incident, I find that Jenkins did not fashion the time on the warning by himself. Moreover, I find it unlikely that Olson would have seen a need to deceive Jenkins and Bassett about the time. Thus, I find that Jenkins, in consultation with Bassett, and with Bassett probably in consultation with Olson (and possibly all three together), conspired to supply a fraudulent time of the incident, moving the actual time from 7:10 a.m. to the false time of 7:30 a.m. The purpose for this fraud was to place Fortin in Casco's work area during the working time of both employees, thereby enabling PDI, by Jenkins, to issue a final warning to Fortin. With any repeat "violation," Fortin could be discharged "on the spot."[13]

Respecting motive, the General Counsel and the Union cite the fact that Fortin was neither scheduled for nor invited to attend any of Bassett's antiunion speeches. (9:1387, Fortin; 18:2976–2981, Jenkins.) I shall not dwell on this point. No complaint allegation attacks this exclusion, and for good reason. Mere exclusion of union advocates from company antiunion meetings, in the absence of some discriminatory impact more substantial than performing their regular jobs during the meetings, is not unlawful. *Daniel Construction Co.,* 266 NLRB 1090, 1102 and fn. 30 (1983.) The union elicited Jenkins' cited testimony for the purpose (18:2975–2976) of countering the thrust of offers by PDI of some of the June "verbal" warnings as showing a good faith (business considerations) motive or state of mind, so as to explain (as a type of good faith background) Jenkins' motivation for the written warning of June 23 (18:2902–2906.) Of course, I have found that the first three "verbal" warnings of June 1994 were unlawfully motivated.

Even if the General Counsel and the Union (addressing the matter that if the exclusion is lawful, how it could be held against the company) had articulated a basis for treating the exclusion as an adverse motive factor, something they did not attempt, I would attach no significance because the record is undeveloped on the matter. Thus, if Fortin was excluded from the meeting of May 17, as well as those for which schedules were made, that could indicate company knowledge even before she tendered her subpena to Jenkins on May 31. On the other hand, perhaps for that meeting Bassett wanted Fortin to handle MDA calls. The record is undeveloped on this, and I need not speculate.

Concluding on this written warning, I find that PDI (with Chairman and major owner Rollance E. "Rollie" Olson intimately involved) was unlawfully motivated when it issued the June 23, 1994 written warning to Vivian Fortin. I also find that PDI failed to establish that it would have issued the warning even in the absence of any union activity. Indeed, I have found that the warning was prepared based on a fraudulent manipulation of the time of the event so that, by such fraud, PDI could issue Fortin a final warning.

In short, respecting the four warnings issued in June 1994, I find that, as alleged, PDI violated Section 8(a)(3) of the Act by imposing the "verbal" warnings of June 1 (the subpena matter) and June 2 (the loading dock incident and the catalog room incident), and the written warning of June 23, 1994 (the Core Department incident.) I shall order PDI to expunge all evidence of these four warnings from her personnel file, and to notify Fortin in writing that this has been done and that PDI will not use these warnings against her in any way.

F. The August 1994 unfavorable job performance evaluation

(1) Introduction

Before beginning my summary of Fortin's August 1994 unfavorable job performance review, I should update her principal union activities. Despite the frequent warnings and harassment in June from Operations Director Jack Jenkins, Fortin was highly visible in her support of the Union at three different points beginning in mid-June. Following the May 31 subpena notice to Jenkins (who promptly told Bassett) and the June 2 publication in the Miami Herald of the news article (GCX 22) about the scheduled election, with Fortin as the only employee quoted by name, Fortin, as noted earlier, was in the group photo (RX 33 at 18; GCX 20) on the leaflet which Bassett displayed at the sessions of his June 14 speech. (20:3599–3602.) The text's large print headlines ask whether employees are concerned about low pay and want job security and to be treated fairly, among other items.

Bassett testified that, pointing to the text at the June 14 meeting, he told employees, "There they go again making promises, promises, promises." (20:3500.) Although Bassett asserts (22:3841–3842) that he pointed to the text above the photo, and

[13] As the sage Amenemope instructed about 1250 B.C.:

Do not make for yourself false documents,

They are a deadly provocation.

M. Lichtheim, 2 Ancient Egyptian Literature 146, 158 (1976, Univ. of Calif. Press.)

denies pointing to the photo itself, the prominent place of this leaflet, with the photo of the seven employees, including Fortin, simply reflects that Fortin was prominent in the organizing campaign.

About July 6, the day before the voting began in the NLRB-conducted election, Fortin and other union activists distributed, to employees in the parking lot of the Broward county facility of PDI, copies of an open memo (GCX 23) from Fortin "To My Coworkers Here At P.D.I." (8:1342–1344; 9:1496.) In the text of her memo, a memo distributed to encourage the Broward facility to join Miami in voting for the Union, Fortin states (GCX 23), above her signature:

> We need the union here at P.D.I. We must all vote Yes to make P.D.I. a better place to work. For years we have put up with the mood swings of our supervisors. They yell at us, give us the silent treatment and [act] real nasty.
>
> Now maybe someone will listen to us and realize we are human beings. We need regular raise increases, affordable insurance, respect and job security. We are not little children. We are all grown men and women. We are the Union. We must vote *YES* to secure our future.

At the bottom of the memo-handbill, under a black hand, white hand handshake graphic, is a graphic of men women and children with the caption, "What we can't do alone we can do together." The handbill bears a large marker-pen headline stating, "Please Read Before You *Vote*." Although Fortin does not know who inscribed that headline on the handbill, she does know that it was there when she distributed the handbill. (81343-1344.)

Finally, at the election itself, Fortin and Ronald Casco served as the Union's observers. (8:1341–1342.)

(2) Prior performance evaluations

Before her August 1994 evaluation, Fortin had received two earlier written evaluations, the first in 1987 (GCX 10) and the second (GCX 9) in 1989. (2:245–248, Pacheco.) Although company records show that Fortin received her last appraisal in June 1992, that was merely a reference to a general wage increase, Pacheco explains. (2:244, 313.) Thus, from 1989 to August 1994, Fortin was not given a performance evaluation. (19:3210, Pacheco.)

The 1987 and 1989 evaluations, or appraisals, are on one-page forms with ten categories to be appraised by checking one of five box-rankings of Superior, Above Standard, Standard, Below Standard, or Unsatisfactory. The 10 categories (including quality and quantity) are followed by an overall ranking, and a space for the supervisor's comments.

In Fortin's March 1987 appraisal, which actually was her 90-day review, Pacheco gave Fortin an overall ranking of "Above Standard." (GCX 10.) Fortin received an "Above Standard" on all categories (including quality and quantity) except two — punctuality, for which she received a "Superior," and judgment, for which she received a "Standard." Pacheco's written comments are consistent with the overall ranking.

Although Pacheco failed to check a box for the overall evaluation on Fortin's April 1989 appraisal, it is clear from the rankings assigned to the 10 categories that the overall ranking again would have been "Above Standard," and I so find. Thus, Fortin received an "Above Standard" in six categories (including quality and quantity), a "Standard" in two (dependability, appearance) and a "Superior" in two (adaptability, work attitude.) For her comments, Pacheco wrote that Fortin needed to improve in answering her extension lines, and in making her call-backs to customers. (GCX 9; 19:3210–3211.)

(3) The new evaluation form

Either for 1994, or by 1994, the appraisal form had changed to a four-page format. The first page is devoted to explanatory comments and instructions, plus a performance rating scale of 1 to 5, with 1 being the lowest ("Well below Standards") and 5 the highest ("Outstanding".) A "2" means "Improvement needed," a "3" means Standards Met," and a "4," similar to that of the prior years, means "Above Standards." (GCX 8; 2:195.)

The performance categories begin on page 2, extend to midway of page 3, and are listed under broad headings beginning with, "I.A. Job Performance Factors." Under I.A. are listed five specific categories of: Quantity of Work, Quality of Work, Timeliness of Work, Cost, and Safety. For each category there are boxes, numbered 1 to 5, for checking in accord with the performance ratings mentioned above.

Heading I.B. is for "Factors Affecting Job Performance." Under this heading are six specific categories: Initiative, Attitude, Adaptability, Communication, Relationship With Others, and Punctuality and Attendance." For each of these the supervisor must check one of the rating boxes numbered 1 to 5.

The next heading is "II.A. Overall Evaluation," with boxes 1 to 5. Heading II.B. is "Potential Ability," and that has four boxes dealing with the potential for promotion, whether properly placed, or not properly placed. The next heading is "III. Development Guide," and it has a space for specific recommendations. Item IV has no heading, but consists of two questions on how long the "Evaluator" has known the employee and how long such evaluator has supervised the employee. There follows a space for the evaluator's signature, date, and title.

That carries use to page 4 of the form where heading "V.I. Employee" provides several lines of space for the employee to record his or her comments. That is followed by a space for the employee's signature and a space for the date. Finally, the "V. Reviewer" space is for comments by the supervisor's superior, followed by the reviewer's signature and date.

In advance of providing some additional summary, I need to give a peek at the August 1994 evaluation's bottom line. On this evaluation, Pacheco (joined by Bassett, as I will describe) gives Fortin an overall ranking (item II.A.) of 2. (GCX 8 at 3; 2:310, 323.) Bassett agrees with "everything" in the review, as earlier noted. (23:4049.) This specifically includes the rather poor rating of "Properly placed" for the category of II.B., Potential Ability." (23:4050.)

The 1987 and 1989 (written) appraisals do not assign a number value to, for example, "Above Standard." As they had five overall ratings, as does the (new) 1994 form, it is clear, and I find, that the "Above Standard" in 1987 and 1989 is the equivalent of the "4" value assigned to 1994's "Above Standards" performance rating, and that 1994's "2" (for "Improvement

Needed") is the equivalent of the old "Below Standard." What brought about this drop for Fortin from a 4 to a 2? Was it for strictly business considerations, or did it come about because Pacheco and Bassett, especially, retaliated against Fortin for supporting the Union?

(4) Fortin's August 3, 1994 evaluation

(a) Bassett directly involved

The first item I address here is the date of Fortin's August 1994 performance evaluation. Although Pacheco failed to sign or date her signature (2:194), she did date the first page as August 3, 1994. Fortin signed, and the date she wrote appears to be August 3, 1994. (GCX 8 at 4.) Ordinarily, Bassett testified, Jack Jenkins, Pacheco's immediate superior, would have signed in the Reviewer's space, but because Jenkins "had resigned" by then (22:3834), Bassett, who edited and reviewed the document "before the review was actually conducted" (22:3833), signed the form where Jenkins would have signed (2:194; 22:3833–3834.) Bassett's signature is dated August 2, 1994. As Bassett did his editing and reviewing before Pacheco interviewed Fortin (GCX 8 at 4; 22:3833), it appears, and I find, that Pacheco would have signed on August 2. That date, I find, is the date when Bassett and Pacheco conferred—the day before Pacheco interviewed Fortin and gave her the evaluation interview.

Bassett testified that he agreed with everything written in the evaluation. (23:4049.) Indeed, Bassett testified, as noted, that "I did edit and review the document," and signed it, before Pacheco interviewed Fortin (22:3833), because (22:3833–3834):

> I had to assure myself, and I wanted to assure our management to make sure that this performance review was conducted and did reflect my thoughts, although not my writing, with regard to the Metro Dade problem I was having, and I wanted to make sure that there were plans and counseling going forward.
>
> So, I did review the document prior to the giving of the review. I signed the document indicating that I had reviewed the document, and I wanted to make sure that whatever weight I could give to it with regard to making sure that I knew what was on the document, I wanted to make sure that that happened. That's [his direct involvement] typically not the case.

Had Jenkins been there, Bassett would have done this through Jenkins, meaning that he would have expressed his concern to Jenkins. "I did have significant concerns, particularly with the loss of sales. I wanted to be sure that—you know, my habit in my management was, make sure this is covered, make sure that is covered in the review process so that we can expect improvement." (22:3834.)

It appears that Jenkins tendered his resignation about early July and departed by the end of July 1994. Jenkins testified that he worked at PDI "until August" (18:2841), and Bassett asserts (22:3834) that Jenkins "had resigned" (that is, Jenkins had departed) by August 2 when Jenkins did the review. Moreover, when Jenkins submitted his resignation, Bassett removed him from "the direct loop" and Bassett assumed Jenkins' line-of-command responsibilities. (2:3917–3918; 23:4052–4053.)

This preliminary data about Jenkins' departure, and about Bassett's direct involvement in editing, reviewing, and signing Fortin's August 3 performance evaluation, has a bearing on the credibility aspects of that appraisal. Based on the foregoing facts and all the record, I find that the August 3, 1994 evaluation (GCX 8) was not simply Pacheco's, but is properly termed, as I find, the Pacheco/Bassett evaluation of Fortin. Turn now to Bassett's reference to the drop in sales.

(b) The asserted drop in MDA sales

According to Bassett, in late June he noticed that the sales figures for MDA were dropping. About the same time, Robert Ortega (who did not testify), the outside sales person handling Metro Dade, began reporting that customer service for MDA was deteriorating. Bassett directed Jenkins to get the problem corrected. Bassett believes that the problem was that Fortin was simply not answering the telephone. The sales figures for the month ending about July 25 dropped from about $33,000, a month earlier, to about $20,00. (20:3566–3569; 22:3910–3918; 23:3999-4012.)

Jenkins (who does not corroborate Bassett's testimony about directing him to investigate and resolve the problem of the MDA sales crashing) also testified that Ortega complained to him about not being able to contact Fortin, and that he (Jenkins) had also received some calls himself from Metro Dade callers who were "irritated" at the service. Jenkins recalls no specifics. (18:2845–2847, 2941.) Thus, on cross examination by the Government (18:2942–2943):

> Q. And is there any notation that was made in her personnel file concerning a complaint from Salesman Robert Ortega?
>
> A .I don't recall, sir.
>
> Q. Did you ever discuss these customer complaints with Vivian Fortin?
>
> A. My recollection is I did, sir.
>
> Q. When did you discuss the first customer complaint with Vivian Fortin?
>
> A. I don't recall the date, sir.
>
> Q. When did you discuss the second customer complaint with Vivian Fortin?
>
> A. I do not recall, sir.
>
> Q. When did you discuss the third customer complaint with Vivian Fortin?
>
> A. Same response, I do not recall.
>
> . . . .
>
> Q. Did you ever document, in Vivian Fortin's personnel file, your discussion with her regarding customer complaints?
>
> A. Well, I'll have to let the file speak for itself. I don't recall.

To the extent that Fortin's personnel file spoke for the record, it did not disclose documentation of any such complaints by Ortega or conversations with Fortin about any such complaints. (Bassett concedes that no Metro

Dade customer ever submitted a written complaint regarding Fortin's service. 22:3922.) I find that Jenkins never had any such conversations with Fortin and that he never received any such complaints from Ortega.

Even Pacheco testified that Ortega had called her to complain that Fortin was taking too long to respond to the Metro Dade calls and that Fortin let her phone ring too long. Unfortunately, Pacheco does not recall when Ortega made these complaints to her other than that it was sometime in 1994, but she does not recall whether it was before or after the July election. Despite the fact Ortega complained more than once, no notation was placed in Fortin's file. (19:3207–3208, 3265–3270.) Indeed, Pacheco apparently never even spoke to Fortin about Ortega's complaints because, recall (2:226, 305), she never counseled her after the third time which, as I summarized earlier, (supposedly) occurred in early 1994. As therefore might be expected, Pacheco's pretrial affidavit says nothing about customer complaints. Instead, in that affidavit Pacheco describes problems with productivity. (19:3290–3291.)

Actually, Pacheco claims to have spoken with, or counseled, Fortin sometime before the August evaluation about production. Pacheco asserts that, on this occasion, she told Fortin that she (Fortin) was "not getting a lot of calls." Pacheco asked what was happening. (2:201.) Pacheco's description then seems to merge that event with the earlier conversations with Fortin. The significant point, however, is Pacheco testified (it is unclear whether she also said this to Fortin) that, by this time, Eddie Leeds was with Fortin sharing Fortin's load and, in fact, shouldering most of the load. Leeds was assigned to help her when Fortin's voice mail system was removed. (2:201, 206-207, 254.)

According to Pacheco, Fortin did not need the voice mail because Leeds was helping her. (2:206.) But Pacheco concedes that Leeds was assigned only after the voice mail was removed. (2:207.) Bassett advises that the special phone number (which the Metro Dade customers could call to get Fortin), along with the voice mail, and the special van for delivering specifically for orders to MDA, were eliminated about June as a result of the cost reduction program which began about that time. (23:4005, 4009, 4011.) As to Leeds, recall from my earlier description, concerning Bassett's reestablishment of the Metro Dade account, that beginning in July 1994, Fortin, as she could, was to help Leeds with look-ups for other customers. (20:3540, 3564; 22:3908; 23:4010.) Leeds would not assist Fortin because of the exclusivity accorded MDA. (22:3907.) Even Jenkins disagrees with Pacheco, testifying that MDA was Fortin's "sole" assignment as of May and June. (18:2844.) And when Fortin was given some responsibility outside MDA, it was, as Jenkins wrote on the written warning of June 23, to serve "as back up to Eddy Leeds." (GCX 24.)

Even Jenkins disagrees with Pacheco, testifying that MDA was Fortin's "sole" assignment as of May and June. (18:2844–2845.) And when Fortin was given some responsibility outside MDA, it was, as Jenkins penned on the written warning of June 23, to serve "as back up to Eddy Leeds." (GCX 24.) That is consistent with Bassett's description.

Besides such discrepancies pertaining to Pacheco, another reason I do not credit her is that, per the credited testimony of Fortin, immediately following Fortin's appearance, under the Union's subpena, at the representation hearing scheduled for June 1, Pacheco turned cold and unfriendly toward Fortin, whereas previously Pacheco had been most friendly. They had been family friends for years. (8:1345–1347; 9:1492–1493.) This change, I find, was the result of Pacheco's knowledge of Fortin's support of the Union. I also find that such antiunion coldness is the basis—the only basis—for the various criticisms, and the poor ratings, which Pacheco leveled against Fortin in the evaluation of August 3, 1994.

Return now to Bassett's testimony. According to Bassett, after Fortin received her unfavorable evaluation on August 3, MDA sales returned to the previous level. The evaluation, in Bassett's opinion, had a motivating effect on Fortin and therefore achieved the result intended. (23:4065–4067.) Once again, by late August, Fortin's handling of MDA was an "asset" to PDI. (23:4083, Bassett.)

I do not believe any of this testimony. The company witnesses all testified with an unfavorable demeanor, and conflicts abound among their versions. For example, with the heavy emphasis on Ortega's complaints and the claimed drop in the volume of sales to MDA (PDI offered no business records to support the figures mentioned by Bassett), one would expect to find that fact highlighted in the August 3 evaluation. Instead, Pacheco wrote, "I do not receive complaints from customers." (GCX 8 at 3.) At trial Bassett, asked if he agreed with that, and after receiving confirmation of the quote, testified (23:4049), "Then I agree."

Respecting Bassett's claim that sales declined in July, no business records were offered in support of this claim. I find that, whatever the figures, Fortin had reached a number, possibly $33,000, rather quickly and maintained that number thereafter until the effects of PDI's cost reduction program, and the extra work for Fortin of assisting Eddie Leeds, began to impact adversely on Fortin's ability to keep the MDA sales volume up. Another reason I do no credit Bassett's version is that he was very unpersuasive in asserting that he had no need to do anything beyond telling Jenkins to solve the problem. After all the personal involvement which Bassett had invested in reestablishing the MDA, I find it highly implausible that Bassett would not personally have gotten deeply involved in a real investigation had there really been a problem. One of his first acts (as it was in May when he heard that employees were signing union cards) would have been a personal conversation with Fortin. But he does not even claim there was such. I do not believe one word of Bassett's testimony on this matter.

As for Bassett's testimony that sales were restored in August to June's $33,000 figure, I note Vice President Mark Noble's testimony that MDA sales had "fallen off" and were continuing to decline. (17:2790, 2800.) Although Noble gives no dates or figures, his language is more consistent with a steady decline, not a big drop in July, followed by a big surge in August, and then a steady decline. I so find. In short, I do not believe Bassett regarding his big drop/big surge description of the sales history for July-August 1994. Instead, I find that any change in sales may well have been a decline, but it was a steady decline

beginning in July 1994. Moreover, such steady decline had nothing to do with any deficiencies by Fortin. Rather, the decline was the natural, and apparently the not unexpected, result of the cost cutting measures which PDI undertook beginning in late June 1994.

(c) The specific entries

Before we turn to the entries that yielded the overall 2, note Pacheco's testimony that, in arriving at the overall number value of 2, she did not have a chart listing assigned weights, or values, for the specific categories. That is, no chart or guide told her, for example, that the Quality category is worth 10 points. (2:322–323.) By extension, therefore, no chart assigns points for the numbers, such as 10 points (for Quality) for a 5 rating, or, say, 2 points for a 1 rating on Quality, with a range of total points for all categories being equal to one of the overall rankings of 1 to 5. Stated differently, the 1994 appraisal system does not use a point system so that 1 to 20 points earns a 1 overall, 21 to 40 points earns a 2, 41 to 60 points a 3, 61 to 80 a 4, and 81 to 100 a 5.

Instead, the supervisor (Pacheco here) simply eyeballs the categories and numbers, does mental comparisons of the work done with the job duties, and assigns number weights on a subjective basis. While a point system would not eliminate the subjective aspect, it would assign specific weights to the different categories and to the category ranking numbers.

Turn now to the specific entries. The first category, under I.A., Quantity of Work, and for this category, Pacheco rated Fortin as a "2." (2:195.) In the space for comments on this category, Pacheco wrote: "Daily review of ACD inbound and outbound calls indicate quantity of work needs improvement. 17 outbound calls added to inbound. Calls still put you in the lower percent of answering calls." (GCX 8 at 2.) What Pacheco has done is the review Fortin as if she no longer was handling MDA. Servicing MDA had been a full time job, and it included much more than simply making and receiving telephone calls. Beginning in July, Fortin was told to help Leeds on his overflow of look-ups. That was in addition to her regular MDA work, not in place of it. There was no way Fortin could have been evaluated under a standard of a daily 150 to 300 calls, as if she were back in the phone room doing standard customer service calls. This rating, I find, is the result of the union animus which, I have found, both Bassett and Pacheco harbored against Fortin. Absent that animus, I find that Fortin would have received the equivalent of what she did in 1989 — a 4.

Quality is the second category. For this category, Pacheco gave Fortin a 3., commenting, "You are good at the books & your work meets standard." (GCX 8 at 2.) It is revealing that, even when Pacheco was compelled to write something favorable, the most Pacheco could bring herself to do was to rate Fortin as a 3. That is, Fortin just met the standard. In 1989 Pacheco gave Fortin the equivalent of a 4 for Quality. (GCX 9.) In light of that, and of Bassett's glowing description, at trial, of Fortin's skills, I find that 3 to be tainted by unlawful motivation. Absent that illegal animus, I find that, as she did in 1989, Pacheco would have awarded Fortin a 4.

The third category is Timeliness, and Pacheco awarded Fortin a 2 on this one, also, adding a comment that her low number of calls suggest that Fortin may be chatting on her calls. As with Quantity, the rating given her is tainted by the unlawful motivation underlying the evaluation. As noted, Pacheco's evaluation is written as if Fortin was not involved with the additional duties of handling MDA besides making and receiving MDA calls. Absent the unlawful motivation, I find that Pacheco would have rated Fortin a 4 in this category.

"Cost" is the fourth category, and here Pacheco gave Fortin a 3, inscribing for her comments, "I have not observed you as a cost waster. You are working at standard." The printed explanation under the rating boxes states, "Minimizes controllable cost and effectively utilizes resources on the job." Giving Fortin a 3 in the face of her having, by herself, substantially increased the MDA sales demonstrates that she clearly was utilizing resources. At trial Bassett spoke high praise of Fortin's customer service skills. Indeed, those skills (plus the fact that he trusted her) are why Bassett selected Fortin to handle MDA. Although there is no specific counterpart on the old form, in the absence of any specific complaint by Fortin, I find that, had there been no unlawful motivation, Pacheco would have rated Fortin as a 4.

For the fifth category, Safety, Pacheco gave Fortin a 3. Noting that Fortin's job is not substantially impacted by safety issues, Pacheco nevertheless states on the form, "However, I have seen you in the warehouse and you are careful. Therefore your safety meets standards." There is no safety category on the old form. Nevertheless, on the old form, in 1989, Pacheco gave Fortin (the equivalent of) a 4 for Judgment. In light of (the equivalent of) an overall 4 in 1989, and a 4 in the Judgment category, I find that, absent discrimination here, Pacheco would have given Fortin a 4 on Safety in August 1994.

Turn now to the second group, that of I.B., the factors affecting job performance. The first category is Initiative, and here Pacheco has given Fortin a 2, commenting, "It is my observation that you often require detail instruction on new things and do not always appear confident. You need to improve [in] this area." At trial Bassett theorized that the description refers to Fortin's possible failure to take quickly to computer technology. For someone who supposedly has been called a computer "guru" (20:3634), yet does not know how to insert a page break in a computer document and therefore has to use the return key to bring up the top of the next page (23:4039–4042), Bassett's trial supposition that Fortin is equally slow at learning computer skills is grossly unimpressive. As it was Fortin who, "without detailed instructions" (the printed standard under the rating boxes), substantially increased sales on MDA, I find the rating here, and the comments of Pacheco and Bassett, to be a total fabrication in order to put Fortin in a false light. Absent the virus of antiunion animus, Pacheco would have awarded a 5. Although there is no Initiative category on the old form, she received a 5 on Adaptability and a 5 for Work Attitude on the 1989 form. These are related to initiative.

For the next category, Attitude, Pacheco gives Fortin a 3, commenting, "You show interest in your job and you cooperate. You are operating at standard." As noted, Pacheco gave her the equivalent of a 5 in 1989. At trial, Bassett testified that

Fortin always "cheerfully" volunteered for anything that needed to be done. (23:3994.) Yet after the Union came on the scene, Bassett, I find, saw to it that Pacheco's evaluation rated Fortin no more than a 3—even when they had only good things to say. Absent the taint of unlawful motivation, Pacheco and Bassett, I find, would have awarded Fortin a 5.

The third category here is Adaptability, and Pacheco gave Fortin a 3, writing, "As [with] Initiative you need to improve to adapt to new situations. Your experience in converting to new ADP is [a] very good example. I'm sure you can improve if you try." I find that Pacheco simply overemphasized the normal learning process here in order, as with the initiative category, to put Fortin in a bad light—all for the purpose of laying the paper groundwork to get rid of her. Absent that unlawful motivation, I find that Pacheco, as she did in 1989, would have given Fortin a 5.

"Communication" is the name for the fifth category. Pacheco rated Fortin as no better than 1. The printed explanatory matter reads, "Effectively presents facts and ideas both orally and in writing; keeps his/her supervisors and others informed of pertinent matters." Pacheco wrote, "You are operating below standard. For some reason you continue to ignore me, your supervisor, and do not keep me informed or involved in your assignments. I try to communicate with you but you do not return it." Contrary to the assertion that Pacheco has tried to communicate with Fortin, Pacheco testified that, before the evaluation, she had not tried to speak with Fortin about any perceived problem with communication. (2:307–308.) Later in the trial she seeks to say that her earlier reference to management did not include her respecting a communication problem. (19:3298, 3205.) That does not get around her earlier testimony in which she clearly states that, before the evaluation, she had not spoken with Fortin about any problems with communication. (2:307.)

Pacheco's rating of Fortin on this topic of Communication is largely an extension of the rating on Quantity in that Pacheco is blaming Fortin for having low production. Pacheco then blames Fortin for not telling her what her problem is (one wonders what the supervisor's job is) so that Pacheco can help Fortin solve her production problem. (19:3206–3209, 3256, 3261, 3294–3295.)

It just so happens that, not long after the August evaluations, Pacheco threw out the telephone (ACD) records. (2:187, 190, 312.) Thus, they were not available for inspection at trial. (2:187.) Actually, as Pacheco admits (2:316), she did not review the ACD records before the three supposed counselings beginning about November 1993, but relied on her memory of the daily reports shown on the ACD computer screen. In view of that admission, it seems quite likely that she also relied on her memory for the assertedly low production after Fortin began handling the Metro Dade account in March 1994.

In fact, as I find, there was no low productivity by Fortin at any time. And as Fortin has credibly described, the problem with communication between Pacheco and Fortin arose only after Fortin presented her subpena to Jenkins on May 31. After that, Pacheco abandoned her old family friend and began treating Fortin coldly. A grade of 1 for Communication was indeed earned, but by Pacheco rather than by Fortin. Thus it is, as with the law of Moses (Dt. 19:18–19), that which Pacheco assigned for Fortin is really her own grade for both communication and credibility.

There is no specific counterpart on the old form, but under Job Knowledge on the old form is an element which provides, "Asks questions when necessary." That element ties closely to the matter here stressing communication with the supervisor. In 1989 Pacheco gave Fortin the equivalent of a 4 for Job Knowledge. Absent the discrimination here by Pacheco and Bassett, that is the rating which, I find, Fortin would have been awarded on August 3, 1994—a 4.

The next category is Relationships With Others, and here Pacheco gave Fortin a 3, commenting, "You are operating at standard. I do not receive complaints from customers." For the equivalent category in 1989, Human Relations, Pacheco gave Fortin an "above standard," or, if effect, a 4. Absent the discrimination here, that is, I find, the rating which Pacheco would have given Fortin in August 1994.

The last item in the I.B. group is that of Punctuality and Attendance. For this category Pacheco gave Fortin a 1, showing that Fortin had been absent 9 days during the past 12 months. Pacheco wrote, "You are below standard. 9 days out, no matter what the reason, is not acceptable. You must work on this." There is no category for attendance on the old form. There is one for punctuality, but it covers being at the work station on time at the beginning of the day and after breaks. Absences, as such, are not covered. The evidence does not address this category. Although Pacheco's language of no excuse for missing 9 days seems unnatural, as it fails to allow for a major problem such as a broken leg, there is nothing in the record to match against this particular rating. Although I suspect that it is a bit of overkill, motivated by unlawful animus, and that an honest rating would have been no less than a 2, I am constrained to pass to the next topic.

The next group is II,A. Overall Evaluation. As earlier mentioned, Pacheco gave Fortin a 2, writing, "Your overall performance indicates improvement required." Under II,B. Potential Ability, Pacheco checked the third box down of "Properly placed," rather than the top box of "Promotable now" or the second box of "Promotable with additional training and experience." The last box, "Not properly placed," suggests that a demotion is in order. For comments under this II,B., Pacheco wrote, "But need to work harder in sharing the work load with Eddy." [Note that Pacheco wrote nothing here, or anywhere, of a need for Fortin to be at her desk and answer the telephone so that Fortin could restore the sales volume lost in July on MDA.] Pacheco offers no explanation, either on the form or at trial, as to how Fortin, having pleased the top management by bringing the MDA sales volume back to a desired level, was expected to keep doing that plus, beginning in July, shoulder some of Leeds' work in doing look-ups. Bassett also offers no explanation. The answer, I find, was simply to load Fortin down with more work so as to give cause for criticizing her in this very evaluation. In short, I find that the negative comments by Pacheco were the result of the unlawful motivation displayed by her and by Bassett.

Before making my concluding discussion about the overall rating, I pass to the next topic of III. Development Guide. In

her comments there, Pacheco advises Fortin to check in with her at least once a day for the next 30 days "and we will work together to improve your performance and our relationship." For the next topic Pacheco writes that she has known Fortin for 16 years and supervised her for 8 years. For item V. Reviewer, I already have noted that Bassett writes that he has reviewed the document before the review session and that he concurs. (23:4049.)

The final section, in time sequence, is item VI. Employee (Employee's comments and acknowledgment.) In this section Fortin wrote, "I believe that there was a misunderstanding between Luisa and I. I believe that now that we have talked, things will be better and things will improve." Pacheco admits that she did not read this, and testified that Fortin did not express this thought at their interview. (2:324.) On this point, I accept Pacheco's testimony. It fits with the humble image which Fortin projected as a witness. Indeed, Fortin testified that she said nothing because she wanted to keep her job. (8:1371.)

(d) Olson directly involved

Return now to the overall rating. While I have stressed the role of Pacheco and Bassett, there is one other person who, I find, played a behind-the-scenes role. That person was Chairman Rollance E. "Rollie" Olson. Although Bassett sought to downplay the Olson connection in May when knowledge was gained about union activity, I do not credit Bassett and his convenient lapses in recall as to what Olson said in their conversations. See, for example, 22:3869, 22:3872. Indeed, I find it most likely that, contrary to Bassett's testimony about selecting the attorney (20:3569; 22:3868), that it was Olson who selected the attorney. Keep in mind that, although Olson's primary office is in Roanoke, Virginia, he also maintains an office in Miami. (22:3868.) In this connection, I note that it was Olson who arranged for Margarita Prieto to verify the translation of the videotapes. (17:2713.) As Vice President Mark Noble informs us, the Union's organizing drive was mentioned at the weekly staff meetings which President Al Woods held with his top executive staff. Conveniently, Noble recalls very little about what was said concerning the Union because the meetings were "functional." (17:2736–2737, 2821–2822.) I do not believe Noble, and I find that he recalls very well the specific nature of the frequent discussions that were held about the Union's organizing campaign. Chairman Olson generally attended such staff meetings. (17:2819.) From these weekly meetings, and other reports coming to him in his position as a major owner of the company, Olson, I find, maintained an intense interest and oversight concerning the Union's organizing drive at Miami.

Moreover, when Olson saw Fortin walk into the Core Department before work, as I have found, it was Olson who, rather than simply having Jenkins investigate the matter, directed Jenkins to issue a disciplinary warning to Fortin. I make that finding based on the fact that Olson told Jenkins about the matter (18:2868, 2956, Jenkins) and Jenkins then prepared the warning before even meeting with Fortin. (18:2957.) Moreover, as I also have found, the time of the incident was fraudulently manipulated to place Fortin there at the 7:30 a.m. start of the shift rather than the actual time of about 7:10 a.m. I find that Olson was personally involved in that fraudulent shifting of the time, and that he approved it in order that a formal warning could be placed in her personnel file as the basis for her later termination.

(e) Conclusions

In light of these findings about the personal involvement of Chairman Olson respecting the Union matters, and specifically as to Vivian Fortin, I further find that when Bassett conferred with Pacheco it was for the purpose of assuring that the category point ratings and the overall point rating were low. I find that before meeting with Pacheco, Bassett had conferred with Olson. Thus, I find Olson was intimately involved with the plan to give Fortin a low rating, and that this was done for the dual purpose of (1) retaliating against Fortin because she betrayed management's trust by supporting the Union, and (2) laying the fraudulent groundwork to get rid of Fortin as soon as possible.

In short, I find that Fortin's August 3, 1994 job performance evaluation, with its overall rating of 2, was a fraud based on the unlawful motivation of antiunion animus. Top management's animus against the Union is so virulent that it resorted to slandering this good and dedicated worker, [14] a worker who "cheerfully volunteered" (23:3994, Bassett) when anything needed to be done, in order to industrially destroy her for supporting the Union. But as the prophet warns (Hosea 8:7):

> When they sow the wind, they shall reap the whirlwind.

Absent the unlawful discrimination against Fortin, she would have received, consistent with the evidence here and her 1989 evaluation, an overall rating of 4. I so find. Finding merit to complaint paragraph 15, I find that PDI, as alleged, has violated Section 8(a)(3) and (1) of the Act by issuing the unfavorable evaluation of August 3, 1994. I shall order that PDI revoke the tainted evaluation of August 1994, and mark its records for her as being deemed to have received, on her August 1994 performance evaluation, an overall rating of 4.

g. Vivian Fortin laid off October 27, 1994

(1) Introduction

Following Fortin's August 3, 1994 performance evaluation, and as earlier noted in the section on Background, PDI laid off 25 Miami warehouse employees in August. Of these warehouse employees laid off, 12 were named in an unfair labor practice charge (RX 49) which NLRB Region 12 subsequently dismissed. (24:4107.) The 12 are among the 13 named in complaint paragraph 17 as having been laid off August 10 in violation of Section 8(a)(5.) Bassett testified that the August layoff was part of his cost reduction plan. (24:4154.) As I mentioned earlier, in footnote 9, the complaint does not allege that PDI was unlawfully motivated in making either its August or October layoffs.

[14] Or to use management's own glowing terms, this "valued" (18:2988, Jenkins), "exemplary" (18:2991, Jenkins), and "excellent" employee (20:3538, 3562; 22:3906, Bassett) who was an "asset" (23:4083, Bassett) to PDI.

As I earlier mentioned when describing PDI's operations and senior management, in September 1994 President Al Woods, restructuring PDI's managerial format from geographical to functional, appointed Mark Noble as Vice President of Warehouse Operations. Assertedly unhappy that PDI was below the industry's standard for productivity, Woods (apparently about September to early October) "mandated" that Noble eliminate 40 persons from the payroll, 10 from the support staff in Roanoke and 30 from Noble's distribution centers. (17:2737–2738.) Respecting the 30, Noble, after comparing production numbers (Miami was at the bottom for PDI), decided that Miami's share of the 30 would be 9. (17:2740.) In the end, Noble testified, he failed to reach the 30, laying off a total of only 28. (17:2741.)

In Noble's view, Miami was overstaffed with administrative or clerical employees, and he decided to eliminate the 9 from that group. (17:2745, 2801.) Because Miami had no distribution manager at the time, Noble personally handled the layoffs there. (17:2739–2740.) Respecting Miami, at some point, Noble prepared a computer spreadsheet. (17:2748.) The spreadsheet (RX 31) has 26 names in rows down the single page, and 12 columns across for data such as Name, Job Title, and such. From this pool of 26 clericals, Noble would select 9 for layoff. Whether Noble prepared the spreadsheet, or worksheet, before he decided on the number of 9, or after, is unclear. But it is clear that he used the worksheet extensively in selecting the 9 from the 26. (17:2748–2749.)

The 12 columns across are designated: Employee Name, Job Title [not job descriptions, but payroll classifications, 17:2794], Dept., B/L [bilingual, 17:2749, 2753], YTD Tardy, YTD Absent [since start of fiscal year on November 26, 1993; 17:2751], DOH [date of hire, 17:2750], DOB [date of birth, 17:2750], Job Status [the only entry in this column is the abbreviation "elim" in the row for each of the 9 to be laid off], Comments [only a handful of comments, including fact that two of the nine had recently quit and should not be replaced], and Pay Rate. With the two recent quits, Noble testified, he needed to lay off only 7. (17:2754.) About October 27 (8:1313; 11:1727; 17:2775) Noble laid off these 7:Beverly Fields, Vivian Fortin, Norma Gonzalez, Mary Mack, Magdalena Sierra, Annia Vigos, and Emily Woods.

Included among the 26 "file clerk," "office clerk," "clerk," and other clerical categories which Noble listed on his spreadsheet, 10 employees, including Fortin, are shown with the job title of "phone sales" and in the department of "sales." Of these 10, only Fortin and Michelle Sanchez (who quit just before the layoff) were rated as a 2. Six (G.D. Jordan, Edward Leeds, Sara Mitchell, Ana Paredes, Virginia Randle, and Linda Shingles) are shown as 3s. The phone sales group had one 4 (Evelyn Peeler) and one 5 (Diane Hinton.)

(2) Noble's layoff methodology

To select those for layoff, Noble adopted primary and secondary criteria. The primary factor was job performance. (17:2745, 2788, 2798.) Secondary criteria, as determined by Noble, were attendance, cross training, and longevity. (17:2745, 2765, 2788–2789, 2798.) Despite the fact that Noble has a column to show bilingual ability, Noble, at trial, seems to downplay this as a secondary factor, testifying that it would be a factor if it would affect the job the person had. (17:2793–2794.)

Because the last performance evaluations were recent, having been done in August, Noble simply looked at the August 1994 overall ratings. (17:2746–2749, 2750, 2764.) As noted, the worksheet column for "P/R" is for this factor, and in that column appears the numbers reflecting each employee's overall rating from the August evaluations. Of the 22 employees named on the worksheet who have ratings [3 of the 26 do not (but they are a quit and two recent hires)], and not counting the 2 of Michelle Sanchez, a recent quit, the overall ratings are distributed as follows:two were rated as a 5; five were rated as a 4; eleven as a 3; and four (including Fortin) as a 2.

To reach his needed number of 7, Noble first targeted those with an overall rating of 2. (17:2766–2774, 2777, 2803.) That would have given him four for layoff (Fields, Fortin, Mack, and Zenaida Requejo), but because there was no one else who knew how to handle the export work being done by Requejo, Noble passed over Requejo. (17:2777–2778.) To the three 2s who were selected, and laid off (17:2776-2770), Noble moved to the 3s, selecting Norma Gonzalez, Annia Vigos, and Emily Woods. (17:2771–2774.) Magdelena Sierra was the seventh person laid off. Rehired in June 1994, Sierra had no recent performance evaluation, and Noble put heavy emphasis on the brevity of her recent date of rehire. (17:2752, 2771.) Although the receptionist, Zaida Rodriguez, had just been hired in May, only 5 months earlier, Noble passed over Rodriguez because she was "doing a good job" and because the receptionist position is a "very difficult position to fill," and because Rodriguez was the only receptionist at the Miami facility. (17:2718–2719, 2816–2817.)

According to Noble, with limited exception, he did not know whether any of the seven laid off were for or against the Union (17:2770–2774), and, when making his selection decision, union considerations played no part. (17:2765, 2787–2788.) The exceptions are Beverly Fields, who Noble overheard loudly telling Pacheco and others that she was not for the Union (17:2766–2767, 2786, 2827), and Vivian Fortin. As to Fortin, although testifying that he did not know whether Fortin supported the Union (17:2769, 2788, 2804), and after initially denying that he ever overheard any remarks that she did (17:2788), finally conceded, during the Government's cross examination, that he had stated in his pretrial affidavit (17:2806–2807) (emphasis added):

> Indirectly I was aware of Fortin's prior Union involved [involvement], and indirectly through hearsay I may have heard about her Union involvement.

At trial Noble stresses the "may have" aspect, asserting that he recalls no specific incident or conversation by which he may have learned. (17:2806–2808, 2829.)

According to Noble, before he laid off the seven, he did not consult with anyone in management, including Pacheco, concerning the performance evaluations, or an employee's abilities, of those he had selected for layoff. (17:2748, 2791, 2826.) Noble has no idea whether Pacheco, in preparing Fortin's evaluation, was influenced by Fortin's union activities. (17:2827.)

Noble claims that, although he knew that the Union had filed unfair labor practice charges, he was not aware of the content of the charges, and in fact wanted to remain uninvolved so that he could make his layoff decisions uninfluenced by considerations related to whether someone was a union supporter. (17:2830–2832.)

(3) Fortin laid off

October 27, 1994, a Thursday, was Fortin's last day at PDI. On that day Fortin was called into the office (Jenkins' former office) where Vice President Noble, after telling Fortin to "Sit down," informed Fortin, "We're letting you go because you have a low work performance." Fortin said that if he was not happy with the work she was doing in "that" position, to return her to taking orders in the phone room. Fortin told Noble that she had been at PDI nearly 10 years, and that she spoke both English and Spanish. Noble replied that such was irrelevant, that it was just that her work performance was low. Fortin said "Okay," and left. (8:1313–1315, Fortin.)

Noble recalls that Fortin was "particularly disturbed" by her layoff, and that she said that she had done her best, and that it was not fair for her to be laid off. Noble told her that he was not accusing her of failing to do her best, only that in this case that may not have been adequate." (17:2775.)

As I discuss below, I generally do not credit Noble, whereas I do credit Fortin. However, as Noble's account of the layoff interview is not inconsistent with Fortin's version, I accept the foregoing description by Noble as supplementing the account given by Fortin.

According to Noble, he laid off Fortin because her performance rating was a 2. (17:2767, 2790.) Noble was returning the MDA business, which had fallen off, to the regular customer service function. The catalog look-up work, that Fortin also did, also would be handled, under Noble's restructuring, by the phone room personnel. With those two functions (Metro Dade and catalog look-up) being merged into the phone room, Fortin's job was eliminated. With her performance rating of 2, Noble did not consider moving Fortin to another position and retraining her. (17:2767–2769, 2790.) The phone room group, from which none were laid off other than Fortin (17:2812; RX 31), was handling the incoming calls adequately (17:2812.) Moreover, (17:2776–2777, 2814–2815) Noble did not want to displace anyone in the phone room [to move in Fortin] because that person typically would have a "following" of customers, whereas Fortin, who had been absent from the phone room for about a year (as he understood the performance evaluation) would no longer have a following. Noble concedes (17:2816), however, that he does not know whether anyone in the phone room actually had a following. Although Noble testified that Fortin "wasn't working in the phone room" (17:2811), that would have reference only to her location. Noble's own chart (RX 31) lists Fortin and nine others as part of "phone sales." And Pacheco testified that Fortin was the only one laid off from phone sales. (2:250–251.) Finally, the separation document (GCX 141) prepared by PDI lists her as "phone room clerk."

Noble also looked at Fortin's attendance record, and he considered her 13 absences as substantial. (17:2790–2791.) Although Noble knew that Fortin spoke Spanish [Fortin testified that she is fluent in Spanish, 8:13770], and that some of the customers speak Spanish (17:2808, 2811), Noble saw no reason to investigate about the number of calls coming in from Spanish-speaking customers because the "core" group in the phone room were handling incoming calls "adequately." (17:2812–2813.) Noble also, in Fortin's case, did not look at her file at all, or to look at the jobs for which she was cross trained, because her 2 rating eliminated the need to do so. (17:2798–2799, 2808.) Finally, Noble testified that he would have laid off Fortin even had she been rated as a 3. He did not know where she would have been laid off had her overall rating been a 4. However, had she been rated as a 4, he would have investigated to see whether "something could have been done." (17:2776, 2813–2814.) To Noble, a rating of 4 is "superior." (17:2772.)

(4) Discussion

(a) Contentions

Although arguing that Noble should not be credited, the General Counsel further argues (Brief at 123) that, but for Fortin's unlawful performance evaluation, she would not have been laid off. This seems to assume the Union's argument (Brief at 24) that, absent discrimination, Fortin's August 3, 1994 overall performance rating would have been a 4. It further assumes, without benefit of case citation, that the improper motive for the performance evaluation would be imputed to Vice President Noble.

As noted earlier, other than Fortin (and Michelle Sanchez, who quit just before the layoff), none of the phone sales personnel were among those laid off in October 1994. (2:250–251, Pacheco; RX 31.) This is so despite the fact that six of them were rated as 3s. One of the 3s was Virginia Randle who, Bassett testified, had not been able to keep the MDA sales from dropping substantially while she handled both MDA and her regular phone room calls. (This is not a criticism of Randle. Bassett testified, as earlier described, that the function needed to be separated to be successful. Nevertheless, it is Fortin, not Randle, who is associated with an image of success.)

If Noble considered Fortin's absences as high, at 13, then he surely would have viewed G.D. Jordan's 14 absences as bad. Yet Noble retained Jordan, a "3." (RX 31.) Noble testified that longevity was one of the secondary factors, yet Edward Leeds, hired in 1988, was retained, even though Fortin, hired in 1986 as Noble's worksheet shows, was laid off. (RX 31.) Indeed, of the six 3s, four (Sara Mitchell, Ana Paredes, Virginia Randle, and Linda Shingles), besides Leeds, had been there a minimum of 1 year less time than Fortin. Shingles was not hired until 1993, and Paredes not until 1993, yet each was retained over Fortin.

Bilingual skills also were a secondary factor, and in this category, of the six 3s who were retained in phone sales, only one, Ana Paredes, possessed them. (RX 31.) Even with Noble's effort to downplay bilingual skills as a factor outside of a job calling for such (17:2793–2794), Noble at least concedes that some of the incoming phone calls are in Spanish (17:2808, 2811.) Under Noble's system then, and even if considered only as a cross training skill rather than as an immediate plus for a

phone sales representative, bilingualism still would be a positive factor favoring Fortin's retention.

As for Noble's testimony about a following, no objective evidence supports his statements. On the other hand there is no specific evidence showing that Noble was aware that Fortin, as described by Bassett (20:3538), had a major following on catalog look-ups, or, as described by Carlos A. DeLascagigas (24:4180–4186, 4192–4193), that customers would take parts to her for matching. Indeed, Fortin is known so well in the auto parts industry that her case against PDI has been a topic of discussion in the local industry. (24:4190.) Moreover, recall Fortin's testimony that most of those in the phone room merely take orders by telephone, whereas she and one other employee also did look-ups. (8:1316; 9:1485–1486.) Thus, it was likely that the two persons skilled in look-ups would be the ones with a following, not mere order takers.

Finally, in light of the foregoing, the Union contends (Brief at 27) that Noble's refusal to admit he would have retained Fortin if her overall rating had been a 4 "contradicts his testimony about the predominance of the written evaluation in his decision. It is starkly inconsistent with retaining six phone room employees and Eddie Leeds who received a '3'. Noble answered as he did because he wished to protect PDI's case even though anti-union animus determined the evaluation of Fortin." I agree.

PDI contends that the General Counsel has shown no disparity in treatment of Fortin, and no "knowledge" on the part of Noble, who was the decisionmaker. Moreover, even if the Government established a prima facie case, PDI demonstrated that it would have laid off Vivian Fortin for legitimate business reasons. (Brief at 71-78.)

(b) Analysis and conclusions

As already mentioned, I do not credit Vice President Mark Noble. His demeanor was unpersuasive, and I do not believe him as a witness. His denials notwithstanding, I find that Noble did have discussions with management before he made his October 1994 layoff selections. Indeed, I find that the inclusion of Vivian Fortin in that layoff was not an independent event, but a result implemented in accordance with a central plan devised at the highest levels of PDI's corporate hierarchy. Specifically, I find that Noble was merely implementing a plan either devised or approved by Chairman Rollance E. "Rollie" Olson in order to get rid of her because, in supporting the Union, she had betrayed the "trust" which top management, particularly Division President Peter Bassett, had placed in Fortin.

Contrary to Bassett's testimony, and as I have found, Bassett coordinated everything with Olson from the very beginning of word that employees were signing union cards. The oral warnings by Jenkins, which began the very afternoon after Fortin returned from the scheduled representation hearing of June 1, was part of a central plan, devised by Bassett and Olson, to lay the paper groundwork to get rid of Fortin.

When Olson observed Fortin pass his office well before the start of the 7:30 a.m. shift, he followed her to the Core Department where she asked Casco for a ride home after work that afternoon. As I have found, the written warning which followed fraudulently moved the time from 7:10 a.m. to 7:30 a.m. in order to tag Fortin as having gone to speak to Casco during working time. This fraud was done, as I have found, with Olson's blessing. Because of the evidence showing Olson's direct involvement in the case, I draw an adverse inference from the fact that he did not appear and testify both as to this written warning, to Fortin's inclusion in the October 1994 layoffs, and as to his conversations with top management, including Vice President Noble, concerning Fortin's inclusion in that layoff. *Ready Mixed Concrete v. NLRB,* 81 F.3d 1546, 1552 (10th Cir. 1996.)

Fortin's August 3, 1994 performance evaluation, an additional fraud, as I also have found, moved her closer to an industrial firing squad. The stage was now set for Fortin's industrial execution, and all that was needed was the occasion. That occasion came in the nature of the October 27, 1994 layoffs. Noble, I find, was instructed by Olson, either directly or through President Al Woods, to include Fortin in the layoff on the basis of her overall 2—a 2 that had been planted by Olson and Bassett for just this purpose, the way that an employer might frame a worker by planting false evidence in order to cause the discharge of an unwanted employee. [15] See *Southwest Distributing Co.,* 301 NLRB 954, 980-984 (1991) (stale "throw-down" beer planted on driver's route), and *Acme Die Casting,* 309 NLRB 1085, 1152-1153 (1992) (supervisor falsified production rates), enfd. except remanded as to unrelated issue, 26 F.3d 162, 146 LRRM 2736 (D.C. Cir. 1994.)

With these findings of animus and fraud leading up to the October layoffs, PDI would be responsible for the unlawful motivation, which resulted in Fortin's overall 2, and for her inclusion in the layoff, even if Vice President Noble had not been part of the scheme. The tainted August 3, 1994 evaluation would bind PDI in the layoff of Fortin regardless of Noble's personal innocence. This is so, as the courts have phrased it, to prevent a company from "laundering" a "bad" motive by passing the decision, on planted evidence, to a third manager outside the conspiracy loop. See *Grand Rapids Die Casting Corp. v. NLRB,* 831 F.2d 112, 117 (6th Cir. 1987), citing and quoting from *Boston Mutual Life Insurance Co. v. NLRB,* 692 F.2d 169, 171, 111 LRRM 2983, 2985 (1st Cir. 1982); *Springfield Air Center,* 311 NLRB 1151 (1993.)

Although that result obtains even if Vice President Noble had no knowledge and no unlawful motive, I find that he had both. As to knowledge, in view of Noble's admissions that he "might have heard" that Fortin supported the Union, in light of the other evidence, and because I specifically disbelieve his denial of knowledge, I find that he did know of Fortin's support of the Union. *Ready Mixed Concrete Co. v. NLRB,* 81 F.3d 1546, 1552 (10th Cir. 1996 ("might have heard".)

In finding that Noble personally shared the unlawful motive, I find that he exercised all options against Fortin, giving her no

[15] "In Salt Lake, Joe, by God," says I,
Him standing by my bed,
"They framed you on a murder charge."
Says Joe, "But I ain't dead."
Says Joe, "But I ain't dead."
Earl Robinson and Alfred Hayes, *Joe Hill*, verse 2 (1925, 1938.) Edith Fowke & Joe Glazer, Songs of Work and Protest 20 (1973, Dover Publications.)

credit for her job skills (I disbelieve his testimony that he did not know what her file contained and that he did not confer with Bassett and other management), her bilingual ability, or her longevity. This, coupled with his knowledge, as I find, that Fortin's August 1994 evaluation had been rigged to drop her from a 4 to a 2, seals Noble's motive in an envelope of unlawfulness. I further find that, as Fortin would have received an overall 4, absent the unlawful retaliation against her, she would not have been laid off. Instead, one of those with a 3 rating, if anyone, would have been selected for layoff.

As if lions attacking some hapless wildebeest on the Serengeti Plain, PDI's corporate lions, as is done all too often on America's industrial Serengeti, just as surely devoured Vivian Fortin. Fortin's courage in the face of the unlawful attack calls to mind the refrain from Woody Guthrie's 1940 song, *Union Maid*:

> Oh, you can't scare me, I'm sticking to the union. I'm sticking to the union, I'm sticking to the union. Oh, you can't scare me, I'm sticking to the union, I'm sticking to the union till the day I die.

Edith Fowke and Joe Glazer, Songs of Work and Protest 17-19 (1973, Dover Publications.)

As alleged in complaint paragraph 16, in conjunction with paragraph 25, I find that PDI violated Section 8(a)(3) of the Act when it laid off Vivian Fortin on October 27, 1994. I shall order PDI to offer Fortin reinstatement to the position in phone sales it would have given her had there been no discrimination, and that it make her whole, with interest.

G. The Requested Bargaining Order

1. Introduction

By complaint paragraph 21, the Government requests a bargaining order. As is reflected in the General Counsel's brief (Brief at 132), that request is based on the Supreme Court's opinion in *National Labor Relations Board v. Gissel Packing Co.,* 395 U.S. 575, (1969.) *Gissel* confirms the Board's authority to issue a bargaining order, even when the Union (as here) lost the election, in two situations. The first one, or Category 1, covers cases marked by "outrageous" and "pervasive" unfair labor practices the coercive nature of which cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be held. In this category of cases, the Supreme Court approved the Board's issuance of a bargaining order even though the union has never obtained a majority showing. *Gissel, 395 U.S. at 614.* After *Gissel*, however, the Board decided that it no longer would issue bargaining orders in the absence of a majority showing. *Gourmet Foods,* 270 NLRB 578 (1984.) And see *Fieldcrest Cannon,* 318 NLRB 470, 474 fn. 8 (1995), modified on other point, 153 LRRM 2617 (4th Cir. 1996.) As a practical matter, therefore, the former Category 1 violations have been merged into Category 2 as a type of informal subset of the latter.

Second, falling into what is known as Category 2 cases are those situations where, at one point, the union has established majority support and the unfair labor practices, although less severe and pervasive than those in Category 1, nonetheless still have the tendency to undermine majority status and impede the election processes. In fashioning a remedy for Category 2 cases, the Board may properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then the Board "should issue" that bargaining order. *Gissel,* 395 U.S. at 614.

Category 3 cases are those in which the unfair labor practices are considered "minor" or "less extensive" because of their "minimal impact on the election machinery." A bargaining order is not authorized for Category 3 cases. *Gissel,* Id at 614.

2. The category here

The requests by the Government and the Union for a bargaining order are based largely on allegations pertaining to the May-June speeches by Peter Bassett—allegations which I have dismissed. Even assuming the evidence shows that the Union had achieved majority support based on authorization cards, the question is whether the violations which I have found show Category 2 conduct, for which a bargaining order "should" issue, or Category 3 conduct, for which a bargaining order is not authorized.

The several violations I have found consist of the mid-May interrogation of Vivian Fortin by Division President Peter Bassett, and, at the same time, Bassett's offer to improve working conditions for employees if they withdrew their support for the Union. [Complaint paragraphs 5(a) and 5(c.)] These are violations of Section 8(a)(1) of the Act. Additional violations found are the May 20 posting [a new practice] of a promotional opportunity into management, [16] Fleet Supervisor Robert Williamson's mid-May coercive restraint of Ronald Casco [complaint paragraph 6(a)], his June 22 imposition of a no-access rule on Ronald Casco on June 22 [complaint paragraph 6(c)], and his coercive interrogation of Albert Rosado on June 29 [complaint paragraph 6(b)], plus Office Manager Pacheco's June 20 threat of unspecified reprisals against driver Jose Castro [complaint paragraph 7], give a total of seven Section 8(a)(1) preelection violations.

The preelection violations of Section 8(a)(3) consist of the May 20 posting of a supervisory opportunity [complaint paragraph 12, as already noted] and the two warnings in June 1994 to Vivian Fortin [complaint paragraph 13].

Postelection unfair labor practices, as found, are violations of Section 8(a)(3), and consist of the July-September 1994 wage increases [complaint paragraph 14], the tainted performance evaluation given to Vivian Fortin on August 3, 1994 [complaint paragraph 15], and [complaint paragraph 16] PDI's unlawful layoff of Fortin on October 27, 1994. That makes three preelection violations of Section 8(a)(3) and three (counting all the general and the individual wage increases as a single item) postelection violations of Section 8(a)(3) of the Act. Keep in

[16] Complaint paragraphs 5(f) [Section 8(a)(1) violation] and 12 [Section 8(a)(3) violation].

mind that, beginning with Vivian Fortin's interview by the Miami Herald reporter on June 1, the newspaper's coverage (GCX 22) the next day, quoting Fortin by name (an article admits reading the day it was published), Fortin's handwritten memo (GCX 23) distributed to the second facility, in Broward county, and her status as one of the Union's two election observers (Ronald Casco, the other observer, was among those laid off in August) Fortin had become the most prominent symbol of the Union's organizing campaign following the June 2 article, naming and quoting her, in the Miami Herald.

Because of Fortin's position of prominence, the discrimination against her would tend to undercut the Union's support among the other employees. However, there is no evidence that other employees were made aware of the June warnings to Fortin, or told of the tainted August 3 evaluation. As there is evidence that the local auto parts industry in the Miami area was aware of Fortin's layoff and her case against PDI, I infer, and find, that the allegations concerning the nature of her October 27, 1994 layoff were know to and discussed by the employees at PDI.

The violations here, I find, are Category 2. In addition to the several instances of 8(a)(1) violations (some of which were made by the highest ranking official in Florida, Division President Peter Bassett), the general wage increase to the entire bargaining unit, plus individual merit increases that followed, cannot be undone. It removes one of the principal benefits employees seek through representation. The postelection wage increases here leave the bargaining unit with the image of an employer who will accommodate their desires if they just tell the Union to go away. Thus, the wage increases plus the elimination of Fortin serve as a powerful combination punch effectively knocking out any future organizing.

The discrimination against Vivian Fortin, the symbol of the Union's organizing campaign, reinforces the chilling effect of the wage increases and other violations. Fortin's layoff especially tends to freeze any urge of other employees to support the Union. Fortin's layoff and her case against PDI were a topic of discussion in the local auto parts industry and, as I have inferred, likewise discussed by bargaining unit employees.

Finally, although Peter Bassett is no longer with PDI, Chairman Rollance E. "Rollie" Olson, a major owner of PDI, and Vice President Mark Noble (as of the trial) still are. Absolutely nothing suggests that these corporate officials are likely to change their animus against the Union. That being so, merely ordering another election (plus issuing a cease and desist order and requiring that a notice be posted) would be a futile remedy, for the animus at Regional Director flows from the top down. It is not possible to erase the effects of the violations here. On balance, the employee sentiment expressed in the authorization cards would be best protected by a bargaining order. I turn now to ascertain whether the Union ever enjoyed majority support.

3. The card majority

a. Introduction

Although the Union does not address the card count, the General Counsel and PDI are in near agreement on the number of bargaining unit employees, with the General Counsel putting the number at 102 (Brief at 129) and PDI (Brief at 84) fixing the count at 101. The one difference appears to be Margarita Hernandez. The Excelsior list [17] (GCX 5), with its 94 names, does not include the name of Margarita Hernandez, nor is hers one of the stipulated names. Even so, the General Counsel contends (Brief at 130 fn. 46) that Hernandez should be counted as a member of the unit because PDI did not show that she was not in the unit. This argument is based on the further contention that, as the party seeking to exclude an employee, PDI has the burden to show that the employee (Hernandez) is not eligible. The General Counsel cites no authority for this proposition. Sub silentio the General Counsel may be relying on the principle that a party seeking to exclude an individual from voting has the burden of establishing ineligibility. *Golden Fan Inn,* 281 NLRB 226, 230 fn. 24 (1986.) But that rule applies when the individual's name is already on the voting list and a party challenges his ballot. Here the burden is on the party seeking to add a name to the list of eligible voters or, actually, to the bargaining unit. That party is the General Counsel, not PDI, and the Government's first burden is to show that Hernandez was a PDI employee.

Margarita Hernandez signed an authorization card, dated May 12, 1994. (GCX 12–23.) Hernandez did not testify, and Vivian Fortin testified as the authenticating witness. (8:1376; 9:1441–1447, 1527–1531.) As Hernandez came to Fortin at work, obtained a card from Fortin, returned it to Fortin a day or two later at work, and signed the card in Fortin's presence at work, the implication is that Hernandez was an employee at PDI. The completed portion of the card shows, by hearsay, that Hernandez, as of May 1994, was working for PDI as a clerk in the computer room. I also note that the name of Margarita Hernandez appears on Vice President Noble's worksheet (RX 31) as a data processing clerk who quit shortly before the October layoffs. (17:2756, 2769.) Finally, the latest (GCX 73) of two W-4 forms in evidence for a Margarita Hernandez has, I find, the signature of the same person who signed the authorization card (GCX 12–23), with the address being the same on both documents, as is the social security number.

I draw three conclusions from the foregoing. First, there is sufficient evidence to find, as I do, that a Margarita Hernandez worked during the relevant time at PDI as a data processing clerk, not as an office clerical, that she was a member of the bargaining unit, and that the authorization card (GCX 12–23) is hers. With the name of Margarita Hernandez thus added to the bargaining unit, I find that the total number of bargaining unit employees, at the relevant time, was 102. For the relevant time, in determining the total number, I turn to the payroll eligibility cutoff date as set by the stipulated election agreement (GCX 17) approved June 3. That cutoff date was May 27, 1994. (5:762.) [Actually, that a signer entered the unit after the cutoff date for election eligibility or was omitted from the voting list does not negate his card. *Waste Management of Utah,* 310 NLRB 883, 910 (1993.)]

[17] The list of eligible voters. *Excelsior Underwear,* 156 NLRB 1236 (1966.) See Hardin, 2 The Developing Labor Law 1786 fn. 87 and 1809 fn. 241 (3d ed. 1992, ABA, BNA.)

With the bargaining unit comprised of 102 employees, the General Counsel needs to show that, at one point, the Union, to demonstrate majority status, had valid cards from 52 employees of the bargaining unit. Of the 68 cards (GCX 12–1 through 12–68) which the Government offered in evidence, I received 66 cards and rejected 2 cards. The two rejected cards are those of Robert Alegria (GCX 12–52) and Barbara Garcia (GCX 12–56.) If at least 52 of the 66 cards I received are valid cards, then the evidence demonstrates that the Union had a majority. If the valid count falls to 51 or fewer, then there is no basis for a bargaining order.

Record evidence shows that the Union obtained most of the authorization cards from employee solicitors rather than directly from individual employees. On brief, PDI does not attack the language of the authorization cards. Respondent contends, however, that many of the cards are invalid because the signers either did not understand what they were signing, or there were misrepresentations made, or the cards have incorrect dates, unidentified handwriting, different colors of ink, or similar characteristics. PDI specifically attacks the cards of 17 named employees (Brief at 85–89.) That attack is in addition to PDI's contention, as discussed much earlier, that all cards proved up by the handwriting expert, Lillian Newman, and those which I received based on my own comparison of handwriting samples, must be rejected. As for the handwriting comparisons by Newman and by me, I adhere to my rulings at trial, as reaffirmed in my order of December 3, 1996 (RX 50), as I mentioned earlier in this decision when I discussed procedural matters.

For the gist of that order, as it pertains to a judge's authority (even duty) for analyzing handwriting samples, I quote the following paragraph from my order (RX 50 at 2):

> A day earlier I inspected several authorization cards and other documents and compared signatures. FRE 901(b)(3); *Advanced Mining Group*, 260 NLRB 486, 513 (1982); *Ken's IGA,* 259 NLRB 305 fn. 2 (1981), mod. on other grounds 697 F.2d 798, 112 LRRM 2587 (7th Cir. 1983); *G. P. Putnam's Sons,* 226 NLRB 1256, 1268 (1976.) Based on my inspection, I received some cards and declined to receive others. The purported authorization card (GCX 12-52) of Robert Alegria is one of those which, after comparing signatures, I did not feel comfortable enough to receive. (15:2333.) That ruling left the General Counsel and the Charging Party free to offer other evidence authenticating Alegria's purported card.

To the cases cited, I would add *Waste Management of Utah,* 310 NLRB 883, 908 fn. 119 (1993) (ALJ compares card signatures with those on W-4 forms); *Bi-Lo,* 303 NLRB 749, 770 fn. 40 (1991), enfd. granted sub nom. *NLRB v. So-Lo Foods, Inc*., 985 F.2d 123, 142 LRRM 2384 (4th Cir. 1992) (ALJ, citing authority, uses W-4 tax forms as exemplars for comparing signatures on authorization cards); and *Justak Bro. & Co.,* 253 NLRB 1054, 1079 (1981).

Also, from near the end of the order, I quote two further paragraphs (RX 50 at 5–6):

> Finally, PDI's fourth ground, that I, as the trier of fact, should not compare the W-4 signatures to the card signatures, is a bit unclear. The argument apparently is meant to say that the whole process of comparing signatures is unreliable and should not be used for determining the validity of authorization cards. PDI must address that argument to Congress (respecting FRE 901(b)(3)) and to the Board, for they have authorized the procedure.
>
> Similarly, to the extent Respondent's fourth ground can be interpreted to suggest that such a comparison by the ALJ serves to taint the ALJ as a partisan, or to convert the judge into a witness favoring the party which benefits most from his card inspection, I give a similar answer. Congress and the Board have spoken, and any argument for change must be directed to one or both of them.

b. The 17 cards specifically attacked by PDI

(1) Applicable law

As to the grounds of PDI's attack on the cards, and noting that PDI offers no citation of authorities in support of its contentions, I need not dwell on the evidence. This is so because Board law, especially as reinforced by the Supreme Court in *Gissel*, presumes the validity of cards which (as Here) are unambiguous on their face and where there is no evidence the purpose of the card was deliberately misrepresented to the signer. See *DTR Industries,* 311 NLRB 833, 840 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994.)

Claimed misrepresentations that the cards were to get rid of then Warehouse Manager Bill Beaman are similar to statements that (unambiguous) cards are to get an election. As the latter do not invalidate the unambiguous cards, *DTR* at 840, neither do the former.

Respecting questions about the dates on the cards, the Board presumes that the date reflected is correct absent evidence to the contrary. *Zero Corp.,* 262 NLRB 495, 499 fn. 14 (1982), enfd. mem. 112 LRRM 2793 (1st Cir. 1983.) Moreover, only an approximate date is needed. *Waste Management of Utah,* 310 NLRB 883, 910 (1993.) And it is immaterial that, without more, cards may show different handwriting for the dates from that of the signatures. *Multimatic Products,* 288 NLRB 1279, 1350 fn. 126 (1988.)

On the subject of employees who do not speak or read English, but instead a foreign language, and where the text of the printed card is printed in English, there must be additional evidence that the card's text was explained in a language the signer understands. *NLRB v. Bakers of Paris,* 929 F.2d 1427, (9th Cir. 1991); *Justak Bro. & Co.,* 253 NLRB 1054, 1080 (1981); *Maximum Precision Metal Products,* 236 NLRB 1417, 1425 (1978.) Where the employees have been made aware of the purpose of the cards, then the signed cards are valid. *Honeycomb Plastics Corp.,* 288 NLRB 413, 416 (1988); *Justak Bros.,* id.

Based on the foregoing general principles, it is clear that PDI's objections to the specific 17 cards are without merit. I proceed now to a description of PDI's contentions and the application of these principles to PDI's arguments respecting the 17 cards.

(2) Conclusions as to the 17 cards

Two cards, those of Ana Diaz (GCX 12–55) and Leo Belaunzaran (GCX 12–46), assertedly were signed after the solicitor or coworkers told the signer that the purpose of the card was to get rid of then Warehouse Manager Bill Beaman. This objection by PDI has no legal merit, and I count the cards as valid.

Albert Rosado credibly testified that he gave a card (GCX 12–50) to Crystal Davis when they were on break, that he saw her sign it, that he put the card in his pocket without signing as a witness because he had to resume working, and that he thereafter forgot to sign as a witness. (13:2149–2151, 2166–2167.) Davis did not testify. Although the date Davis, apparently, placed on the card shows only a "5," Rosado testified that the event occurred the day after the (May 9) meeting with Monica Russo at the Tip Top Cafe (and therefore May 10, 1994), and the card was delivered to the Board's Miami office as reflected by the May 13, 1994 date stamp on the reverse side of the card by the NLRB's Miami office. PDI's objection of the "suspicious" circumstances (Brief at 86) is without merit, and I count the card of Crystal Davis as valid.

Roberto Duarte testified that he observed Emilio Mazzucotelli sign and fill out certain portions of GCX 12-42 in May 1994, and that he (Duarte) then filled in the company's name and signed as a witness. Duarte then submitted Mazzucotelli's card to Monica Russo, the Union's representative. (12:1887–1888, 1947–1960, 1976, 1985–1986.) Duarte does not know who filled in the date section after Mazzucotelli's name, the date being "5/94." (12:1954.) Black ink was used for that date, and blue ink for the entries by Duarte and a slightly darker blue ink by Mazzucotelli. The NLRB Miami's date stamp is not until May 23, 1995—a year after the Union filed the election petition. Monica Russo testified that she received Mazzucotelli's card in May 1994 and that she wrote the word "date," with her initials, on the back of the card to reflect the fact that she had placed the date on the front of the card. (15:2328-2329, 2348–2349.) PDI's objections about the date and the different ink colors having no merit, I count Mazzucotelli's card as valid.

As for the 1995 tendering of additional 1994 cards to the NLRB's Miami office, Russo credibly testified that she initially supplied only what was needed to support a showing of interest. When NLRB Region 12 began an inquiry into whether there was a majority showing to support a bargaining order, Russo released the additional cards that had been maintained at the Union's office. (6:856; 15:2263–2264, 2275, 2345.)

Roberto Duarte also authenticated the cards of Emily Woods (GCX 12–37) and Martha Avendano (GCX 12–40.) The card of Woods was handled very similar to that of Mazzucotelli, with Russo giving similar testimony. (15:2329–2330, 2344–2346.) I find Woods' card to be valid.

PDI complains that Avendano's card has three different colors of ink (Avendano's signature is in black, her social security number is in blue, and so is the name of the employer) and the date may not be in Avendano's hand. [NLRB Miami's date stamp is for May 13, 1994.] There is no merit to PDI's objections, and I count Avendano's card as valid.

Ronaldo Hernandez was the authenticating witness for the cards of several employees, including:Enrique Flores (GCX 12–28), Vidal Henriquez (GCX 12–30), and Elio Trujillo (GCX 12–31.) The cards of the three are printed in English. It is immaterial that neither Hernandez nor any of the three could read English, for Hernandez (10:1607), in Spanish, told the group that the purpose of the cards was to get the Union to represent them with PDI. Two days later Hernandez did the same with employee Jose Ocampo. (10:1640–1641.) This objection of PDI has no merit.

PDI also complains that the card of Vidal Henriquez has strikeovers in a different color of ink for some of the digits in the social security number. (Brief at 87–88.) This objection is frivolous and an abuse of the Board's processes. PDI makes no contention that the identity of Henriquez (there is only one Henriquez on the voting list) is in doubt and that the social security number is needed here to identify Henriquez.

Trujillo's card (GCX 12–33) has a strikeover on the "4" of 1994. Hernandez testified that Trujillo corrected the year, plus making a correction on the company's name. (10:1633–1636.) The objections are without merit, and I count Trujillos card as valid.

PDI argues that Jose Ocampo's card (GCX 12–33) shows the date of the "4" in 1994 as appearing to be in a different hand. Disagreeing with that assessment, I count Ocampo's card (one of those not delivered to the NLRB at Miami until 1995) as valid.

The next two cards are those for Isabel Martinez (GCX 12–21) and Margarita Hernandez (GCX 12–23.) Vivian Fortin is the authenticating witness. Both cards are printed in English. PDI's objection is that neither Martinez nor Hernandez can read English, and as they took the cards home to discuss with their husbands (who did not testify), any contention that these two employees understood the purpose is hearsay.

Another employee had given the card to Martinez, and Martinez came to Fortin so that Fortin could witness her signature. (9:1389, 1531.) The General Counsel offers the card based on an exception to the hearsay rule, that exception being to show state of mind under FRE 803(3.) (9:1394.) Fortin credibly testified that Martinez told her that her husband had told her that "it was all right to sign it if she wanted to bring a Union into Parts Depot." Martinez then asked if Fortin would witness her signature. When Fortin said yes, Martinez signed the card. (9:1406, 1420, 1535.) As Martinez manifested that her intent in signing the card was to bring in the Union, PDI's objections are without merit, and I count the card of Isabel Martinez as valid.

Although Fortin tendered Margarita Hernandez' card to her, the record fails to show that Fortin told her the purpose. (9:1441–1442.) In answer to Hernandez' question, Fortin explained about the Union, told Hernandez that employees were trying to get a Union into PDI for job security, respect, and decent wages. At Hernandez' request, Fortin gave a card to Hernandez. However, nothing expressly links the card to the purpose. (9:1441–1446, 1528.) Nevertheless, when Hernandez returned with the card the next day, she told Fortin that her husband had told her that if she wanted to get a union in PDI, to fill out the card and sign it. Fortin testified that the card was filled out but not signed, and that Hernandez then signed the card, as did Fortin as the witness. (8:1376; 9:1442, 1531.)

Under FRE 803(3), Hernandez' description of her purpose in signing reflects her state of mind, as an exception to the hearsay rule. Finding PDI's objection to be without merit, I count Margarita Hernandez' card (GCX 12–23) as valid.

That brings us to the final four cards attacked by PDI: Martha Perez (GCX 12–13), Cheryl Townsend (GCX 12–14), Ernest Thomas (GCX 12–15), and Marilyn Davis (GCX 12–16.) Perez' card is date stamped at the Board's Miami office on May 13, 1994, but the other three bear a date stamp of May 23, 1995. Ronald Casco is the authenticating witness. Copies of the cards are attached to Casco's pretrial affidavit (CPX 3) of September 16, 1994. PDI's objection here is that Casco did not sign any of the four cards as a witness. PDI's additional objection regarding Perez' card is that the card is in English. Casco admits (7:1103–1104) that his discussion with Perez was in Spanish and that he does not know whether Perez reads English. PDI's language objection as to the Perez card has no merit. First, in Spanish Casco explained that the purpose of the card was to have the Union represent the employees with the company. (7:1097–1098, 1103–1104.) Second, Casco showed Perez a substantially identical card printed in Spanish. (7:1105–1110.)

Regarding the primary objection, Casco testified that he failed to sign as a witness because at the time a supervisor was coming, or he had to return to work, or it was at a spot where a supervisor might see. Asked why he did not sign when he turned the cards over to the Union, Casco vacillated between reasons of fear that someone was reporting names to management, and the excuse that he simply forgot. On redirect examination he testified that he was supposed to sign in the presence of the employee. In his pretrial affidavit of September 1994 (CPX 3), Casco does not address the point of why he did not date the cards when he turned them over to the Union. Although Casco's testimony on this point is poor, I credit his straightforward testimony that he explained the purpose, not only to Perez, but also to the remaining three before each signed and returned the card to him. (7:1112, 1118, 1123; 8:1268.)

Finding PDI's objections to have no merit, I count as valid the cards of Martha Perez (GCX 12–13), Cheryl Townsend (GCX 12–14), Ernest Thomas (GCX 12–15), and Marilyn Davis (GCX 12–16.) As discussed earlier and again shortly, the parties stipulated that Cheryl Townsend is not an eligible voter. That moots any discussion regarding her card, and I do not include her in the bargaining unit.

(3) Majority showing established

That concludes the count of authorization cards. As the record reflects, and I find, the Government has established the validity of the 66 authorization cards which I received in evidence at trial. That number is a majority of the 102 employees in the bargaining unit.

The next question is when did the Union achieve its majority status. Under Board law, when (as here) there has been no demand for bargaining (other than what might exist from the petition filed), the obligation to bargain attaches as of the date the respondent begins a campaign of unfair labor practices, if the Union has a majority at that date, and if no majority at that time, then when the Union attains a majority. *Joy Recovery Technology Corp.,* 320 NLRB 356, 356 fn. 4 (1945.)

The record reflects that when the Union filed its petition on May 13, 1994 in Case 12–RC–7736, it had valid cards from at least 54 members of the bargaining unit. With dates ranging from May 9 to May 13, 1994, and one card (Crystal Davis', GCX 12–50) having an incomplete date (as discussed earlier) but date stamped at the NLRB Miami's office on May 13, 1994, the 54 cards are:GCXs 12–2, 5, 6, 7, 8, 9, 10, 12, 13, 16, 17, (the 18 cards 12-19 through 12-36), 38, 39, 40, 41, (the nine cards 12–43 through 12–51), 53, 54, 55, 57, 59, 60, 61, 62, 63, 64, 65, and 67. That fixes majority status as of May 13, 1994. The first unfair labor practice after that occurred on May 20 with the new procedure of job posting for the warehouse manager's vacancy. Less than 2 weeks later PDI bargain it unlawful retaliation against Vivian Fortin. Thus, under Board law, PDI's obligation to recognize and bargain with the Union attached as of May 20, 1994—the date when, after the Union had reached majority status—PDI embarked on a course of unfair labor practices calculated to undermine the Union.

H. Alleged 8(a)(5) Refusal to Bargain

1. Introduction

PDI admits the factual allegations of the July 1994 general wage increase, the August 1994 layoff of 12 employees, and the October 27, 1994 layoffs of Vivian Fortin and (14:2200–2203) Annia Vigos. PDI also admits that the wage increase pertains to wages, the layoffs to employment, and that it did not give the Union prior notice of either the wage increase or the layoffs. PDI denies the allegation of complaint paragraph 26 that, by failing to give prior notice to the Union and an opportunity to bargain over the wage increase and layoffs, that PDI violated Section 8(a)(5) of the Act.

2. Discussion

Although the General Counsel does not address the refusal to bargain allegations, the Union, citing *Lapeer Foundry & Machine,* 289 NLRB 952 (1988), and other cases, argues that the layoffs were an unlawful refusal to bargain with the Union. Respondent argues that there was no 8(a)(5) violation because there was no demand to bargain.

As *Joy Recovery* shows, PDI's bargaining obligation attached on May 20, 1994 as a matter of law. No demand for bargaining was therefore necessary for a violation of Section 8(a)(5) to accrue. Thus, when PDI unilaterally granted the general wage increase in July 1994, unilaterally laid off the 12 employees effective August 11, 1994, and unilaterally laid off the 2 employees on October 27, 1994, it violated Section 8(a)(5) of the Act, as alleged. I so find.

3. UNITE is the successor to the Amalgamated

Effective July 1, 1995, the Amalgamated Clothing and Textile Workers Union (Amalgamated) and the International Ladies Garment Workers Union (ILG) merged to form the Union of Needle Trades, Industrial and Textile Employees (UNITE.) As she was in 1994, Monica Russo remains the manager of the Florida District Council, the division that would conduct the Union's negotiations with PDI for a contract. (5:768-772.) As I noted at the beginning, the parties stipulated that UNITE is a

statutory labor organization. As PDI has not carried its burden of showing that the merger was not accomplished with minimal due process, PDI remains under the obligation to recognize and bargain with UNITE as the proper successor to Amalgamated. *Sullivan Bros. Printers,* 317 NLRB 561 (1995), enfd. 99 F.3d 1217, 153 LRRM 2752 (1st Cir. 1996); *USA Polymer Corp.,* JD–192–96 (CPX 2; March 25, 1996 decision by Judge Wallace H. Nations currently pending before the Board on exceptions.)

I. Case 12–RC–7736

1. The objections

As noted much earlier, the only objection remaining, outside of those which parallel allegations of the complaint, is Objection 16(a), which pertains to the ballot (CPX 1) which is marked in both the Yes and No squares. The Board agent counted it as a No vote, and the Union's representative objected. (6:917.) The Union (Brief at 47) argues that the ballot should not be counted (in effect, that it should be declared void) because the intention of the voter is not clear. On brief PDI does not address the issue. The question is, did the voter clearly express his intent. *Bishop Mugavero Center for Geriatric Care,* 322 NLRB 209 (1996); *Brooks Bros.,* 316 NLRB 176 (1995); *Caribe Industrial,* 216 NLRB 168 (1975.)

The Yes square is marked with an "X." The mark is rather faint, and possibly is the result of a brief attempt to erase the mark. (Both squares are marked in pencil.) In the No square are multiple heavy dark pencil lines. The end result looks similar to a rough asterisk. On the other hand, the mark is consistent with an effort to cross out, with multiple lines, whatever original mark the voter placed in the square.

In *Brooks Brothers* the voter "clearly obliterated" the "X" in the Yes square by scratching over it with additional markings, leaving an unmistakable "X" in the No box. The Board counted that as a No vote. Did the voter here intend to correct a mistaken mark in the No square and then mark the Yes box? If so, why does the mark in the Yes square appear to be faint? Did the voter really try to erase his mark in the Yes box and try to compensate by leaving heavy and multiple marks in the No box in order to stress that he was voting No? We shall never know. In *Caribe* the mark in either square, absent the other, could be counted—as here. The Board there declared the ballot void. *Bishop Mugavero* (where Chairman Gould, dissenting, would overrule *Caribe*) involved a ballot where the Yes square had a diagonal mark and the No square an "X" mark.

Finding the voter's intent here to be ambiguous, I conclude that the ballot should be declared Void rather than a No vote. Accordingly, I recommend that the Board find Objection 16(a) meritorious. *Bishop Mugavero; Brooks Bros.; Caribe Industrial.*

Consistent with my finding on the complaint allegations, I would find merit to Objections 4 (the portion as to Vivian Fortin), 10 (posting of job openings), and dismiss the remaining objections (being Objections 1, 2, most of 4, 5, 7, 8, 12, and 13.) I so recommend.

2. The challenged ballots

Earlier, when summarizing the Union's organizing campaign, I reported that the parties had agreed on the status of the challenged ballot. This freed the challenges to three names on the voter eligibility list (VEL):Sookdeo K. Choon, Diane Hinton, and Jack Hinton Jr. Thus, the ballots of these three should be counted. I have included them in the count of the bargaining unit.

Similarly, the VEL should have included the names of Otilio Delvie, Zenaida Requejo, and Annia Vigos. The challenge envelopes should be opened and their ballots counted. I have included them in the count of the bargaining unit.

Seven others, as earlier noted, are stipulated as not eligible, and their names were never on the VEL: Glenis Alleyne, Donnette Hawley, Elizabeth Kent, Robert Ortega, Wallace Penzing, Manuel Rodriguez, and Cheryl Townsend. Thus, their ballots will not be opened and will not be counted. Moreover, I do not count them in the bargaining unit total.

Four additional names (Roberto Duarte, Ruben Garcia, Antonio Rodriguez, and Sergio Ruiz) should have been included on the VEL, but were not. I have included these four in the count of the bargaining unit.

The net effect of these stipulated resolutions has been to add seven names to the VEL. When covering majority status, I found that the name of Margarita Hernandez also should be included in the bargaining unit, for a final net count of 102.

3. Concluding recommendation

When a bargaining order is imposed, the Board sets aside the election and dismisses the election petition. *Adam Wholesale,* 322 NLRB 313, 314 (1996); *DTR Industries,* 311 NLRB 833, 836–837 (1993), enf. of bargaining order denied, 39 F.3d 106 (6th Cir. 1994); *Holly Farms Corp.,* 311 NLRB 273, 280 fn. 28, 363 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995.) However, if the challenged ballots of the six voters found eligible were sufficient in number to affect the outcome of the election, I would recommend that their envelopes be opened and their ballots counted as a precaution against the possibility that the Board or a court may not agree with my conclusion that a bargaining order is required here. However, even if all six ballots were cast for the Union, that would give only a tie vote of 46 to 46. When the vote is a tie, the Union loses. Accordingly, as there is no purpose to be served in opening and counting the six challenged ballots, I recommend that the election be set aside and the Union's petition in Case 12–RC–7736 be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Parts Depot, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE) is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehouse employees, customer service employees, truck dispatcher, and drivers employed by the Employer at its Miami and Ft. Lauderdale, Florida warehouses, excluding office clericals, technical employees, professional employees, supervisors, and guards as defined by the Act, constitute a unit

appropriate for collective bargaining within the meaning of Section 9(a) of the Act.

4. The Union is now, and at all times since May 20, 1994, has been designated by a majority of unit employees through valid authorization cards as their exclusive collective bargaining representative within the meaning of Section 9(a) of the Act.

5. By coercively interrogating employees concerning their support of the Union, offering employees improved benefits for the purpose of dissuading them from supporting the Union, and threatening employees with unspecified reprisals in order to dissuade employees from supporting the Union, PDI has violated Section 8(a)(1) of the Act.

6. By granting employees new benefits, disciplining an employee, restricting an employee's movements in the facility, prohibiting employees from waiting for other employees in the facility, giving an employee an unfavorable performance evaluation, granting employees a general wage increase, and laying off an employee, all for the purpose of dissuading employees from supporting the Union, PDI has violated Section 8(a)(3) and (1) of the Act.

7. By unilaterally granting a general pay increase to employees in July 1994, unilaterally laying off 12 employees effective August 11, 1994, and unilaterally laying off 2 employees on October 27, 1994, without consulting and bargaining with the Union, PDI has violated Section 8(a)(5) of the Act.

The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Although generally the Board does not order employers to rescind unlawfully granted benefits and pay increases, because that would simply compound the effects of the unfair labor practices, in unusual situations a union could need a remedial provision permitting it to request a rollback. As that does not appear to be the situation here, and in the absence of a request for such a provision, I shall not include a provision enabling the Union to demand that the general wage increase of July 1994 should be rescinded.

The Respondent having discriminatorily laid off an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987.) Respondent must expunge the tainted August 1994 Performance Evaluation Report from Vivian M. Fortin's personnel file. Respondent must also mark its records to reflect that Fortin is deemed to have received, for her August 1994 performance evaluation, an overall rating of 4.

Respecting the unilateral layoffs, PDI must offer the employees full reinstatement and make them whole, with interest, and bargain with the Union over the decisions and the effects of those decisions. *Lapeer Foundry & Machine,* 289 NLRB 952 (1988.) The loss of earnings and other benefits must be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra. The remedy so ordered will also include Vivian M. Fortin, one of the two employees laid off October 27, 1994, because, under some remotely possible hypothetical, my decision as to Fortin's 8(a)(3) layoff could be reversed even though the bargaining order is affirmed. If my decision regarding Fortin's 8(a)(3) layoff becomes final, then the Union will have no need to request bargaining over Fortin's layoff.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [18]

ORDER

The Respondent, Parts Depot, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting employees new benefits, disciplining employees, restricting employee movement within the facility, prohibiting employees from waiting for other employees in the facility, granting employees a general pay increase, providing unfavorable job performance evaluations, laying off, or otherwise discriminating against any employee for supporting Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE) (the Union.)

(b) Coercively interrogating any employee about union support or union activities.

(c) Offering employees improved benefits for the purpose of dissuading them from supporting the Union.

(d) Threatening employees with unspecified reprisals in order to dissuade employees from supporting the Union

(e) Unilaterally granting pay raises to bargaining unit employees without first consulting with the Union and offering the Union the opportunity to bargain over the decision and the effects of such pay increases.

(f) Unilaterally laying off bargaining unit employees for economic reasons without first consulting with the Union and offering the Union the opportunity to bargain over the decision and the effects of such layoffs.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, 29 CFR 102.46, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, 29 CFR 102.48, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All warehouse employees, customer service employees, truck dispatcher, and drivers employed by the Employer at its Miami and Ft. Lauderdale, Florida warehouses, excluding office clericals, technical employees, professional employees, supervisors, and guards as defined by the Act.

(b) Within 14 days from the date of this Order, offer Vivian M. Fortin full reinstatement to her former job in phone sales that it would have given her absent the discrimination against her or, if that job no longer exists, reinstatement to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Vivian M. Fortin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings issued to Vivian M. Fortin in June 1994, to the unlawful job performance review issued to her on August 3, 1994, and to her unlawful layoff on October 27, 1994, and within 3 days thereafter notify the employee in writing that this has been done and that such discriminatory actions will not be used against her in any way.

(e) Within 14 days from the date of this Order, mark its records to reflect that Vivian M. Fortin is deemed to have received, for her August 1994 performance evaluation, an overall rating of 4.

(f) On request, bargain with the Union concerning the decisions to lay off bargaining unit employees effective August 11, 1994, and again on October 27, 1994, and the effects of those decisions.

(g) Within 14 days from the date of this Order, offer the employees named below, laid off effective August 11, 1994, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Carlos Boufartiguez	Isabel Martinez
Ronald Casco	Aundrai McGregor
Crystal Davis	Chester Umana
Jean-Claude Demosthene	Angela (Lampin) Wilson
Enrique Flores	Jaan Wilson
Ronaldo Hernandez	Altonia Wright

(h) Within 14 days from the date of this Order, offer the employees named below, laid off effective October 27, 1994, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Vivian M. Fortin	Annia Vigos

(i) Make whole the employees named above, laid off effective August 11, 1994 and October 27, 1994, for any loss of earnings and other benefits suffered as a result of their unilateral layoffs, in the manner set forth in the remedy section of the decision.

(j) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facilities in Miami, Florida and Ft. Lauderdale, Florida, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 8, 1994 (the date the original charge was filed and served in this proceeding.)

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official of a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(m) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT grant you new benefits, issue you warnings, restrict your movements within the facility, prohibit your waiting in the facility for other employees, give you unfavorable job

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

performance evaluations, lay you off, or otherwise discriminate against any of you for supporting Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE), (the Union) or any other union.

WE WILL NOT coercively interrogate any of you about union support or union activities.

WE WILL NOT offer you improved benefits for the purpose of dissuading you from supporting the Union.

WE WILL NOT threaten you with unspecified reprisals in order to dissuade you from supporting the Union

WE WILL NOT unilaterally grant pay raises to bargaining unit employees without first consulting with the Union and offering the Union the opportunity to bargain over the decision and the effects of such pay increases.

WE WILL NOT unilaterally lay off bargaining unit employees for economic reasons without first consulting with the Union and offering the Union the opportunity to bargain over the decision and the effects of such layoffs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All warehouse employees, customer service employees, truck dispatcher, and drivers employed by Parts Depot, Inc. at its Miami and Ft. Lauderdale, Florida warehouses, excluding office clericals, technical employees, professional employees, supervisors, and guards as defined by the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Vivian M. Fortin full reinstatement to the former job in phone sales which we would have given her absent the discrimination against her or, if that job no longer exists, reinstatement to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Vivian M. Fortin for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings which we issued to Vivian M. Fortin in June 1994, to the unlawful job performance evaluation which we gave to her on August 3, 1994, and to her unlawful layoff of October 27, 1994, and mark our records, including her personnel file, to show that Vivian M. Fortin is deemed to have received, on her August 1994 performance evaluation, and overall rating of 4, and within 3 days thereafter WE WILL notify Vivian M. Fortin in writing that this has been done and that such discriminatory actions will not be used against her in any way.

WE WILL, on request, bargain with the Union concerning the decisions to lay off bargaining unit employees effective August 11, 1994, and again on October 27, 1994, and the effects of those decisions.

WE WILL, within 14 days from the date of the Board's Order, offer the employees named below, laid off effective August 11, 1994, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Carlos Boufartiguez	Isabel Martinez
Ronald Casco	Aundrai McGregor
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Jean-Claude Demosthene	Angela (Lampin) Wilson
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Ronaldo Hernandez	Altonia Wright

WE WILL, within 14 days from the date of the Board's Order, offer the employees named below, laid off effective October 27, 1994, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Vivian M. Fortin	Annia Vigos

WE WILL make whole the employees named above, laid off effective August 11 and October 27, 1994, for any loss of earnings and other benefits suffered as a result of their unilateral layoffs, in the manner set forth in the remedy section of the decision.

PARTS DEPOT, INC.